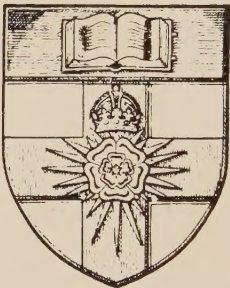
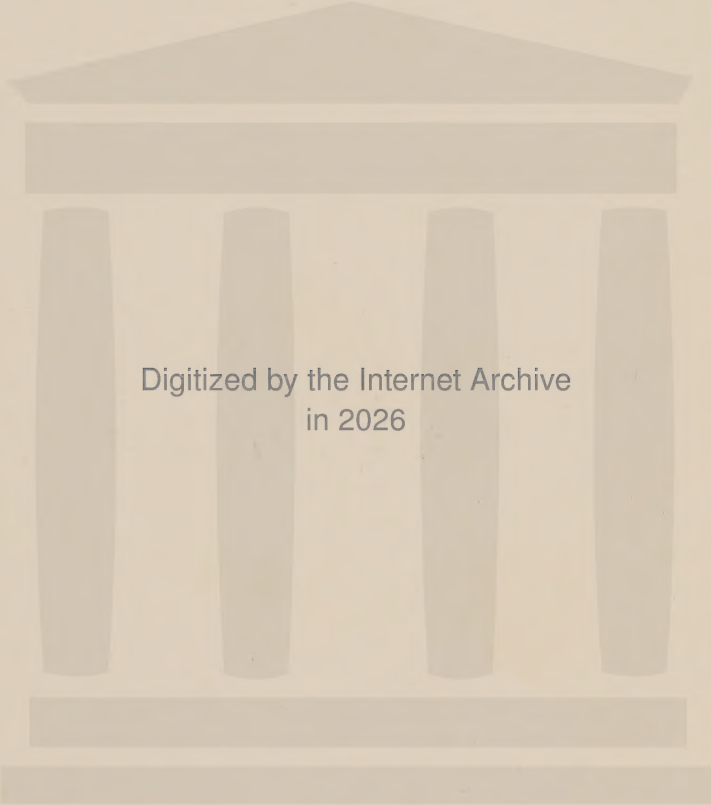




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CASES
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KING'S BENCH DIVISION
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 HIGH COURT OF JUSTICE
 AND BY THE
COURT OF APPEAL
 ON APPEAL THEREFROM
 AND BY THE
COURT OF CRIMINAL APPEAL
 AND BY THE
RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

PAYNE v. BRITISH TIME RECORDER COMPANY,
LIMITED, AND W. W. CURTIS, LIMITED.

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[1920. P. 674.]

Practice—Parties to Action—Joinder of Defendants—Relief claimed against two Defendants in the Alternative—Joinder of Different Causes of Action—Common Question of Fact—Discretion of Court—Order XVI., r. 4.

Under Order XVI., r. 4, which provides for the joinder of defendants, a plaintiff is entitled to join several defendants in respect of several and distinct causes of action subject to the discretion of the Court to strike out one or more of the defendants if it thinks it right to do so.

As a general rule where claims by or against different parties involve or may involve a common question of fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time, the Court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried.

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The plaintiff entered into a contract with the B. Co. to supply them with certain printed cards which should conform to certain specimens supplied to him by them. In order to carry out that contract he entered into a contract with the W. Co. to supply him with the cards which he had agreed to supply, and paid for them. The cards were duly sent to the B. Co. by the W. Co. by the direction of the plaintiff, but the B. Co. refused to accept them on the ground that they did not conform to the specimens supplied by them to the plaintiff. The plaintiff brought an action against the B. Co. and the W. Co. claiming as against the former the price of the goods sold and in the alternative as against the W. Co. damages for breach of contract in not supplying the cards in accordance with the specimens. The B. Co. and the W. Co. made separate applications to the Master to have their respective names struck out as defendants, which he refused, and his decision was affirmed by A. T. Lawrence J. On appeal:—

Held, that the Court had a discretion as to allowing the joinder of the two defendants, and that as there was a common question of fact to be tried, namely, whether the cards were in accordance with the specimens supplied, the Court would in the exercise of that discretion allow the two defendants to be joined in one action.

Decision of A. T. Lawrence J. affirmed.

APPEALS from two orders of A. T. Lawrence J.

The action was brought by the plaintiff against the British Time Recorder Co., Ltd., and W. W. Curtis, Ltd.

The statement of claim delivered was as follows:—

“1. The plaintiff is a supplier of stationery and office requirements and carries on business at 6 Derby Lane, in the City of Coventry.

“2. By a contract partly verbal and partly in writing contained in a letter written by the plaintiff to the defendants, the British Time Recorder Co., Ltd., dated June 25, 1918, and in a letter dated June 27, 1918, from the same defendants to the plaintiff, and afterwards confirmed by two written orders from the same defendants to the plaintiff dated respectively July 29, 1918, and August 29, 1918, the said British Time Recorder Co., Ltd., agreed to purchase from the plaintiff the following clock cards—viz., 280,000 International, 280,000 Rochester and 245,000 National as set out in the order of July 29, 1918, and 210,000 cards of various types as set out in the order of August 29, 1918. The said cards were to be paid for at the rate of 10s. per 1000, and it was a term and condition of the said contract that they

should respectively conform to certain specimens submitted by the said British Time Recorder Co., Ltd.

" 3. By a contract partly verbal and partly in writing, particulars of which so far as it is in writing are set out in an estimate from the defendants, W. W. Curtis, Ltd., addressed to the plaintiff and dated June 18, 1918, and an order from the plaintiff to the same defendants dated July 1, 1918, the defendants, W. W. Curtis, Ltd., agreed to manufacture and deliver to or in accordance with the instructions of the plaintiff clock cards of the number and description set out in the preceding paragraph. The said cards were to be charged for at the rate of 8s. 3d. per 1000, and it was a term and condition of the said contract that they should respectively conform to the specimens referred to in the last preceding paragraph. Particulars of the orders dated July 29, 1918, and August 29, 1918, referred to in para. 2 hereof were on or about July 30, 1918, and August 30, 1918, respectively given to the defendants, W. W. Curtis, Ltd., by the plaintiff.

" 4. The defendants, W. W. Curtis, Ltd., knew that the said clock cards were required by the plaintiff for the purpose of supplying the same to the British Time Recorder Co., Ltd., in performance of the contract referred to in para. 2 hereof.

" 5. The defendants, W. W. Curtis, Ltd., have manufactured the said clock cards and have in accordance with the instructions of the plaintiff delivered the same to the defendants, the British Time Recorder Co., Ltd., and have, save as to the sum of 100%, been paid therefor by the plaintiff. Particulars and dates of the said deliveries amounting altogether to 1,016,245 cards have been furnished by the plaintiff's solicitors to the solicitors of the defendants, the British Time Recorder Co., Ltd., in a letter dated February 13, 1920.

" 6. The defendants, the British Time Recorder Co., Ltd., have refused to accept or pay for the said clock cards and have rejected or returned the same to the defendants, W. W. Curtis, Ltd., alleging that the said cards are not in accordance with the said contracts and/or not in accordance with the said specimens. The plaintiff has been unable to find a market for the same.

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"7. The plaintiff says that the defendants, the British Time Recorder Co., Ltd., have wrongfully refused to accept or pay for the said clock cards and have wrongfully rejected and returned the same to the defendants, W. W. Curtis, Ltd.

"8. Alternatively the plaintiff says that the clock cards as delivered by the defendants, W. W. Curtis, Ltd., to the defendants, the British Time Recorder Co., Ltd., were not in accordance with the specimens and/or the contracts referred to in paras. 2 and 3 hereof.

"9. The defendants, W. W. Curtis, Ltd., on the other hand allege that the said clock cards are in accordance with the said contracts and with the said specimens and that the defendants, the British Time Recorder Co., Ltd., are not entitled to reject the same.

"The plaintiff claims :—

(A) Against the defendants, the British Time Recorder Co., Ltd., 509*l.* 0*s.* 8*d.* agreed price and carriage of clock cards sold and delivered.

PARTICULARS.						£	s.	d.
1,016,245 cards at 10 <i>s.</i> per 1000	..	..	..	..	..	508	6	3
Carriage	..	..	..	..	..	5	14	5
						£514	0	8
By cash received on account	..	..	..	..	..	5	0	0
						£509	0	8

"Alternatively against the defendants, the British Time Recorder Co., Ltd., 509*l.* 0*s.* 8*d.* damages for breach of contract.

"Alternatively against the defendants, W. W. Curtis, Ltd., damages for breach of contract.

PARTICULARS OF SPECIAL DAMAGE.

Loss of purchase price and carriage payable by the defendants, the British Time Recorder Co., Ltd., as set out above	..	..	..	..	..	514	0	8
By amount due from the plaintiff to the defendants, W. W. Curtis, Ltd., as mentioned in para. 5 hereof	..	..	..	..	..	100	0	0
						£414	0	8

The defendants, W. W. Curtis, Ltd., applied to the Master for an order that the writ of summons in the action and the service thereof on them and all further proceedings might be set aside as against them or alternatively that the writ of summons and all subsequent proceedings might be amended by striking out their names and so much thereof as referred to them.

A similar application was made to the Master by the British Time Recorder Co., Ltd.

The two applications were heard together by Master Chitty on July 12, 1912, and were dismissed by him, and on appeal to the judge his orders were affirmed by A. T. Lawrence J. on July 30, 1920.

Both the defendants appealed.

On November 1, 1920, the two appeals came on for hearing together before the Court of Appeal, consisting of Bankes, Scrutton and Atkin L.JJ., and were adjourned in order that the pleadings might be completed.

On November 12, 1920, the defendants, W. W. Curtis, Ltd., delivered their defence by which they alleged that the plaintiff accepted the cards supplied by them as being in accordance with their contract with him, and therefore could not in any event claim to reject any cards as against them. They further alleged that it was the settled notorious custom of the printing trade in the United Kingdom or alternatively of all printers or printing firms and companies belonging to the Federation of Master Printers of Great Britain and Ireland that all complaints in respect of bad printing or printing not up to sample or not according to contract must be made within ten days from the receipt of the goods or alternatively within such reasonable time as the type remained set up, and that no complaint could be made or was effective which was made after the expiration of such ten days or such reasonable period as aforesaid; that the said custom was an implied term of the contract between the plaintiff and these defendants and that the complaints (if any) were too late and that the plaintiff was not in law entitled to make the same. By their counterclaim these defendants counterclaimed

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C. A. the sum of 101*l.* 19*s.* 11*d.* as the price of goods sold and
1921 delivered by these defendants to the plaintiff.

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On November 24, 1920, the defendants, the British Time Recorder Co., Ltd., delivered their defence by which they alleged that the cards were not in accordance with the contract between the plaintiff and these defendants and were not in accordance with the said specimens, and by their counterclaim they counterclaimed (1.) damages for breach of warranty and (2.) payment of the sum of 30*l.* 19*s.* for work done and money paid at the request of the plaintiff.

The appeals were heard together on January 11, 1921.

St. John Field for the defendants, W. W. Curtis, Ltd.

It is submitted (1.) that as a matter of law these defendants cannot be joined and (2.) that to do so would be inconvenient and that the Court in the exercise of its discretion ought not to allow them to be joined.

The fact that there is one common question of fact to be determined is not sufficient to justify a plaintiff in joining two defendants. The allegation as to custom applies only to the plaintiff's contract with these defendants. It is plain on the pleadings that it is inconvenient that these two actions should be tried together. There is not, it is submitted, an absolute discretion in the Court to join defendants in respect of separate and distinct causes of action.

There is no irreconcilability in the cases. There are no doubt certain dicta which are difficult to reconcile with one another, but they were not necessary to the decision of the particular cases.

The real explanation of the decision in *Thomas v. Moore* (1) is to be found in the statement in the judgment of Bankes L.J. where he says that "The defendants were content that their cases should be treated in bulk and not dealt with separately." That accounts for there being no application before trial to have the statement of claim struck out as embarrassing. There was no decision in that case whether or not it was right to join the defendants. The case does not therefore

(1) [1918] 1 K. B. 555, 570.

assist the plaintiff. Under Order XVI., rr. 4, 7, it is submitted, two separate and distinct causes of action cannot be joined against two separate and distinct defendants unless either (i) there is some link, contractual or otherwise, between the defendants or (ii) there is in substance one injury, whether in tort or contract, and the question is whether both or which of two defendants is responsible therefor.

[SCRUTTON L.J. In *In re Beck* (1) Swinfen Eady L.J. stated that those rules must in modern practice be construed liberally.]

All the cases are, it is submitted, reconcilable with the proposition submitted. The only real difficulty is caused by obiter dicta as to the absolute discretion of the Court. *Smurthwaite v. Hannay* (2) was a case of joinder of plaintiffs. There several shippers of cotton joined as plaintiffs, and it was held by the House of Lords that r. 1 of Order XVI., as it then stood, dealt only with parties and not with joinder of causes of action. In consequence of that decision the rule was altered to its present form.

In *Thompson v. London County Council* (3) decided after the alteration of the rule the plaintiff brought an action against two defendants, and it was held that as the causes of action were in respect of separate torts the two defendants could not be joined although the resulting damage might be the same in each case. There was there no link between the two defendants. See also *Pope v. Hawtrey* (4); *Greenwood v. Greenwood*. (5) In *Compania Sansinena de Carnes Congeladas v. Houlder Brothers & Co.* (6) Vaughan Williams L.J. said: "According to my view, in a case where there is no pretence for saying that the respective causes of action, in respect of which several defendants are joined, are other than separate and distinct causes of action, the fact that those causes of action arise out of the same transaction is not a sufficient ground for allowing the defendants to be joined in the same action." Those remarks, it is submitted, apply to

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(1) (1918) 87 L. J. (Ch.) 335.

(2) [1894] A. C. 494.

(3) [1899] 1 Q. B. 840.

(4) (1901) 85 L. T. 263.

(5) (1908) 100 L. T. 68.

(6) [1910] 2 K. B. 354, 362.

C. A. this case. See also *Munday v. South Metropolitan Electric Light Co.* (1)

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[SCRUTTON L.J. The difficulty is to reconcile *Thompson v. London County Council* (2) with the subsequent decisions.]

[LORD STERNDALE M.R. referred to *Oesterreichische Export A.-G. v. British Indemnity Insurance Co.* (3)]

Even if the Court has a discretion to allow the joinder of the defendants it is a judicial discretion which must be exercised in accordance with the decided cases. Here two contradictory cases are set up against the defendants, and there is no reported case in which contradictory cases have been allowed to be joined.

[SCRUTTON L.J. In *Collen v. Wright* (4) contradictory claims were set up.]

In that case there was a contractual link, and the first defendant's repudiation of authority really invited the joinder.

H. J. Rowlands for the defendants, the British Time Recorder Co. I adopt in toto the arguments put forward on behalf of the other defendants. The view formerly taken in chambers was that separate and distinct causes of action could not be joined as against separate defendants. Then came the alteration of r. 1 and the result has been that practitioners have been in difficulties as to what the rule now is. There has been a doubt in chambers as to what the limitation to the rule now is.

J. F. Eales for the plaintiff was not called upon to argue.

LORD STERNDALE M.R. These are appeals from two orders of A. T. Lawrence J. affirming the decision of the Master, the question being whether two defendants were properly joined in an action under Order XVI., r. 4. The appeals were argued on two grounds: first it was contended that there was no power under the rule to join the defendants in the circumstances of the case, and, secondly, that even if there were power, the joinder ought not to be allowed, and that the

(1) (1913) 29 Times L. R. 346;
[1913] W. N. 90.

(2) [1899] 1 Q. B. 840.

(3) [1914] 2 K. B. 747.

(4) (1857) 8 E. & B. 647.

Court in the exercise of its discretion ought to strike out one of them:

The matter arises in this way. The plaintiff who carries on business as an office supplies company entered into a contract with the British Time Recorder Co. to supply them with certain clock cards which should conform to certain specimens supplied to him by the company. In order to enable him to carry out that contract he entered into a contract with W. W. Curtis, *Ld.*, to supply him with the cards which he had agreed to supply to the British Time Recorder Co. He paid most of the price to W. W. Curtis, *Ld.* The British Time Recorder Co. refused to pay for the cards supplied to them on the ground, as they alleged, that they did not conform to the specimens to which they had contracted they should conform.

It does not appear on the pleadings that the specimens supplied by the British Time Recorder Co., *Ld.*, were the same as those supplied by the plaintiff to W. W. Curtis, *Ld.*, but I think there is no substantial doubt that they were all the same in each case. The plaintiff brings his action against the British Time Recorder Co., *Ld.*, for the price of the goods sold and, in the alternative, against W. W. Curtis, *Ld.*, for breach of contract in not supplying the goods in accordance with the specimens whereby he had suffered damage.

The action was brought against the two defendants on different contracts and the amount payable is not the same in each case. The plaintiff's claims are therefore inconsistent in this sense, that the plaintiff can in one event recover against the British Time Recorder Co., but not against W. W. Curtis.

The first point taken was that the plaintiff had no right under Order XVI., r. 4, to join the two defendants. That rule provides: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment." The argument was this. It was said you must apply this test, that in order

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to join two distinct causes of action there must be some link between the two defendants or the damage to the plaintiff must be common to both of them. The first observation to be made on that is that that proposition is not to be found in the rule. But it is said that it is to be found in the decisions of this Court. I do not think that is so. The decisions of the Court are certainly not consistent. Some part of the inconsistency is to be found in this that, after the alteration of the rule to its present form in consequence of the decision in *Smurthwaite v. Hannay* (1), the Courts have not always taken notice of the alteration. I think what Fletcher Moulton L.J. said with regard to those decisions in *Compania Sansinena de Carnes Congeladas v. Houlder Brothers & Co.* (2) is correct. "A number of decisions of the Court of Appeal have also been cited to us. I confess that I find it difficult to reconcile all those decisions, and so I am driven back upon the plain meaning of the words of r. 4, which, as I have said, appear to me clearly to contemplate such a case as the present." I agree that the cases made by the plaintiff against the two defendants are not the same. They are sued on different contracts, in the one case for the price of goods sold and in the other for damages, and the amounts claimed differ in each case. But the words of limitation sought to be read into the rule are not to be found there. I think, as I said in *Thomas v. Moore* (3) that "joinder of parties and joinder of causes of action are discretionary in this sense, that, if they are joined, there is no absolute right to have them struck out, but it is discretionary in the Court to do so if it thinks right." I said that because I thought that was the conclusion established by *Compania Sansinena des Carnes Congeladas v. Houlder Brothers & Co.* (4) and the subsequent case of *Oesterreichische Export A.-G. v. British Indemnity Insurance Co.* (5) It was argued that those two cases did not support my proposition. I think what was said in those cases by Fletcher Moulton L.J. and Buckley L.J. does support the proposition

(1) [1894] A. C. 494.

(3) [1918] 1 K. B. 555, 565.

(2) [1910] 2 K. B. 354, 366.

(4) [1910] 2 K. B. 354.

(5) [1914] 2 K. B. 747.

I stated in *Thomas v. Moore*. (1) And in another case of *In re Beck* (2) Swinfen Eady L.J. stated the proposition in much the same way. I think therefore that the first point fails and that there is power to join these defendants, but that that is subject to the right of the Court to order either one of them to be struck out. I do not think there is any decision which governs the exercise by the Court of its discretion in this case.

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I agree that as regards the question of discretion this case is not the same as any of the decided cases. It is very near the line. Questions are raised between the plaintiff and one of the defendants which are not raised between him and the other defendants, but there is one very important question which is common to both defendants—namely, whether the cards were up to sample. If that is decided the rest of the case is mere fringe.

But then there are other questions as for example the question of custom raised by one of the defendants as to which I will only say that it is difficult at first sight to see how it applies to the plaintiff. Then there is the question of the separate counterclaims and there is the question as between the plaintiff and one of the defendants as to whether the plaintiff did not admit that the clock cards were not up to sample and ask them to return them. But there is, as I say, one main question which is common, and the learned judge who tries the case will be able under Order XVI., r. 5, to avoid any injustice being occasioned to one of the defendants by reason of the fact that some of the questions do not concern them. That rule provides: "It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the Court or a judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest." That rule seems to me quite sufficient to prevent any injustice

(1) [1918] 1 K. B. 555, 565.

(2) (1918) 118 L. T. 629, 631; 87 L. J. (Ch.) 335.

C. A. being done to a defendant who is not interested in subsidiary
1921 questions which concern only another defendant.

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I had some doubt at first whether the statement of claim in this case was not embarrassing, but I have come to the conclusion that on the whole it is not so embarrassing that the Court ought to strike out one of the defendants.

Lord Sterndale
M.R.

Even if the Court were to strike out one of these defendants the only result would be that another action would be brought by the plaintiff against them and the two actions would be tried by the same judge.

I think therefore that no good objection is shown for striking out one of these defendants.

The appeals must therefore be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The first question argued was whether as a matter of law, on the construction of r. 4 of Order XVI., its operation is subject to the limitation contended for on behalf of the defendants. That limitation was that in order to join defendants in respect of two separate and distinct causes of action there must be some contractual or other link between the defendants, or there must in substance be one injury suffered by the plaintiff from one or the other of them. On that point I prefer not to express an independent opinion but to read what was said by Fletcher Moulton L.J. in *Compania Sansinena de Carnes Congeladas v. Houlder Brothers & Co.* (1) and in reading it to adopt it as part of my own judgment. He begins by reading r. 1 of Order XVI. and then says: "The terms of this rule to my mind make it clear that Order XVI. does not now deal solely with joinder of parties, but also deals with joinder of causes of action. Considering that rule with reference to the interpretation of r. 4, it appears to me that, just as the House of Lords, before the alteration of that rule, construed the wide and general language of r. 1 by reference to the general scope of the Order in which they could, as the rules then stood, find no intention to deal with joinder of causes of action,

(1) [1910] 2 K. B. 354, 365.

so now we are entitled to consider the meaning of the wide language of r. 4 as forming part of an Order which purports to some extent to deal with joinder of causes of action. Turning to rule 1 in its new form, I find that the words inserted are of the nature of words of restriction or qualification, which, while they show that it is intended by the rule to deal with joinder of causes of action, at the same time put some limitation on the joinder of causes of action which may be made under it. Looking at r. 4 by the light of that rule, it appears that the Rule Committee deemed it to be unnecessary to insert similar words in r. 4, and that they thought it desirable to keep the terms of that rule of their original width, after having made it clear that the Order was not limited to joinder of parties, but was intended to deal also with joinder of causes of action. The result appears to me to be that we are not now bound to limit the plain meaning of the words of r. 4 by reference to a decision of the House of Lords given under a different state of circumstances, when Order XVI. stood as it was originally framed."

It seems to me that that exactly expresses what I desire to express,—namely, that the limitation, if it exists at all, must be found in the rule itself. In my opinion there is no such limitation as that on which the defendants insisted, and therefore, so far as the question of law is concerned, the appeal fails.

Then it is said that even if that is right as a matter of law, yet as a matter of discretion the judge ought not to have taken the course he took, inasmuch as success against one of these defendants was incompatible with success against the other because the claims were not identical. But there is one outstanding question which is vital to the success of one or other of these defendants and that is whether the goods delivered by the defendants, W. W. Curtis, Ltd., to the defendants, the British Time Recorder Co., Ltd., were in accordance with the specimens submitted to them, assuming them to be identical with those submitted by the latter to the plaintiff. If the goods were in accordance with the specimens, then it would appear practically certain that the

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Warrington L.J

C. A. action as against the defendants, W. W. Curtis, Ltd., would
 1921 fail. On the other hand, if the cards were shown not to be
 PAYNE in accordance with the specimens, then the action against
 v. the defendants, the British Time Recorder Co., would prima
 BRITISH facie fail because the defendants, the British Time Recorder Co.,
 TIME would in that case be entitled to refuse to accept the goods. It
 RECORDER seems to me therefore that one or other of the two defendants
 Co. would in all probability be got rid of at any early stage in
 Warrington L.J. the action. There therefore seems no reason why the judge
 who tries the action should not exercise the discretion given
 him by r. 5 of Order XVI. On the whole it seems to me that
 it is impossible to interfere with the orders made in this case.

SCRUTTON L.J. I am the only member of this Court who
 is fortunate enough to have heard two arguments in this case.
 I heard an argument of Mr. Rowlands last term when the
 appeals came before the other branch of this Court of which
 I was then a member. I then formed the opinion after
 hearing it that the appeals ought not to succeed. I have
 now heard the argument of Mr. St. John Field and my opinion
 still remains the same.

I hope that possibly our judgment, added to the recent
 judgments of this Court, may put an end to the discussion
 as to the power of the Court to allow the joinder of
 parties.

Order XVI. deals with joinder of parties; Order XVIII.
 deals with joinder of causes of action, and it was therefore
 held in *Smurthwaite v. Hannay* (1) that several plaintiffs
 having separate and distinct causes of action could not join
 together in one action against the defendants.

In that case sixteen persons, nine shippers and seven
 consignees of cotton under different bills of lading, brought
 an action against the defendants, the shipowners, for short
 delivery, and it was held by the House of Lords that the causes
 of action were separate and distinct and could not be joined
 in one action under r. 1 of Order XVI. or under Order XVIII.
 or otherwise. There was a similar case in tort in *Sadler v.*

(1) [1894] A. C. 494.

Great Western Ry. Co. (1) where the plaintiff, who found the access to his premises blocked by the several and combined acts of the two defendants, tried to deal with them in one action rather as joint or several tortfeasors, and the same view was taken by the Court. Immediately, in consequence of those decisions, an alteration was made in Order XVI.: r. 1, which dealt with joinder of plaintiffs, was extended so as to include amongst those who might be joined as plaintiffs persons as to whom if they brought separate actions any common question of law or fact would arise, but this alteration was made subject to the proviso "that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the Court or a judge may order separate trials, or make such other order as may be expedient." Rule 4, which deals with joinder of defendants, was not altered. Why the proviso inserted in r. 1 was not inserted in r. 4 I do not know, but the result has been that it is now clear that the practice of the Court has been to read r. 4 as if it contained similar powers to those contained in r. 1 applying to the case of joinder of defendants and to put the same construction on r. 4 as upon r. 1.

At first, as was said by the Master of the Rolls, this alteration of the rule was not appreciated. Thus in *Thompson v. London County Council* (2), decided after the alteration of the rule, the Court, following *Sadler v. Great Western Ry. Co.* (1), a case before the alteration, refused to allow the joinder of defendants in respect of separate torts, and did not even allude to the alteration of the rule.

In my view, having regard to the alteration of the rule, neither *Sadler v. Great Western Ry. Co.* (1) nor *Thompson v. London County Council* (2) would now be decided in the way they were.

There are later decisions which lay down that r. 4 may be applied to causes of action as well as to parties; and that where there are common questions of law or fact defendants sued in respect of different causes of action may be joined.

(1) [1896] A. C. 450.

(2) [1899] 1 Q. B. 840.

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C. A. 1921 *Thomas v. Moore* (1) is one of the latest of such decisions, and since that case was decided there has been the decision in *In re Beck*. (2)

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The result of the later decisions is that you must look at the language of the rules and construe them liberally, and that where there are common questions of law or fact involved in different causes of actions you should include all parties in one action, subject to the discretion of the Court, if such inclusion is embarrassing to strike out one or more of the parties.

It is impossible to lay down any rule as to how the discretion of the Court ought to be exercised. Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time the Court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried.

It appears to me, having regard to the recent decisions of the Court of Appeal, that the power of the Court to allow the joinder of the present defendants is unquestionable.

In the present case A. has entered into a contract with B. to supply him (A.) with certain goods according to sample, and has also entered into a contract with C. to sell the goods to be supplied to him by B. according to the same sample. C. now says that the goods supplied to him are not according to sample. B. says that they are according to sample. The first question of fact is whether the goods which have passed from B. through A. to C. are sold in each case on the same sample. That question would soon be disposed of at the trial. There is then the question common to both cases: Are the goods according to this sample or not? If the two present defendants were not joined the result would be that there would be two actions which would be set down to be heard together. An application would then be made to the judge at the trial not to dispose of one of them until he had

(1) [1918] 1 K. B. 555.

(2) 87 L. J. (Ch.) 335.

heard the other, and the judge would endeavour to get in the evidence in both actions and exactly the same result would follow as if the joinder of the two defendants were allowed.

For these reasons I think that the orders of A. T. Lawrence J. affirming those of the Master were right and that the action should proceed as at present constituted.

I agree that the appeals should be dismissed.

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Appeals dismissed.

Solicitors for W. W. Curtis, Ltd.: *Sharpe, Pritchard & Co. for Roland Hollick & Co., Coventry.*

Solicitors for British Time Recorder Co., Ltd.: *White & Leonard.*

Solicitors for plaintiff: *W. M. Arnold & Co. for H. I. Mander, Coventry.*

W. I. C.

[IN THE COURT OF APPEAL.]

CHRISTIE v. PLATT.

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Nov. 23.

[1919. C. 1512.]

Practice—Costs—Claim and Counterclaim—Judgment for Plaintiff on Claim with Costs—Judgment for Defendant on Counterclaim with Costs—Taxation—Apportionment of Costs.

To a claim by a landlady against her tenant for rent the tenant pleaded that the demised premises were uninhabitable. By way of counterclaim the tenant repeated the paragraphs of the defence and claimed damages. Judgment was entered for the landlady on the claim for 200*l.* and costs, and for the tenant on the counterclaim for 225*l.* and costs. On each side the claim and counterclaim were dealt with in one brief.

In taxing the plaintiff's bill of costs the taxing Master allowed the costs of counsel's brief at the trial, fees to counsel, and costs and expenses of witnesses. In taxing the defendant's bill of costs he allowed nothing in respect of these items:—

Held, that the taxation had proceeded upon a wrong principle; and that costs incurred in supporting the claim and opposing the counterclaim ought to be apportioned by the taxing Master to the best of his ability and that the apportioned parts ought to be attributed to the costs of the claim and of the counterclaim respectively. And similarly *mutatis*

C. A. mutandis as to costs incurred in supporting the counterclaim and
 1920 opposing the claim.

In re Brown (1883) 23 Ch. D. 377 and *Atlas Metal Co. v. Miller*
 [1898] 2 Q. B. 500 discussed.

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APPEAL from an order of Roche J. made upon a review of taxation in the following circumstances.

The plaintiff brought an action claiming 200*l.* rent of a dwelling-house No. 84 Sloane Street under a tenancy agreement dated February 21, 1919, whereby the premises with the furniture, fixtures, and effects therein were let by the plaintiff to the defendant from April 1, 1919, until July 31, 1919, at the rent of 400*l.* to be paid as to 200*l.* on April 1, 1919, and as to the balance on June 1, 1919.

The defence and counterclaim were as follows : " Defence—
 1. The defendant does not admit the tenancy agreement referred to in the statement of claim. For the true terms of the agreement between the plaintiff and the defendant the defendant will refer to the same at the trial. 2. The tenancy of the premises No. 84 Sloane Street in the County of London was a tenancy of a furnished house and it was an implied term of the said tenancy agreement that the said house was reasonably fit for occupation. 3. The said house was not reasonably fit for occupation in that the rooms were uninhabitable by reason of a very offensive smell and by reason thereof were dangerous to health. 4. By reason of the plaintiff's breach of contract as aforesaid the defendant has not been able to enjoy the use of the said premises and has lost the benefit of the said tenancy agreement.

" Counterclaim. 5. The defendant repeats paragraphs 1-4 of the defence therein. 6. The defendant on April 1, 1919, paid to the plaintiff the sum of 200*l.* in respect of the rental of the said premises from April 1, 1919, to May 30, 1919. 7. By reason of the breach of the implied condition aforesaid the defendant has been unable to enjoy the use of the said premises and has lost the advantage thereof. The defendant claims damages."

The reply and defence to the counterclaim contained the following paragraphs : " 1. Save in so far as the same consists

of admissions the plaintiff joins issue on the defence herein.

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2. The said house was at all material times reasonably fit for occupation and the defendant entered and took possession of the same on April 1, 1919, and remained herself in possession and occupation of the same until May 31, 1919.

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3. The plaintiff denies that the said rooms or any of them were uninhabitable or dangerous to health as alleged or at all.

4. Alternatively, if there was an implied condition or a breach thereof, which is denied, the defendant by entering upon the said premises and remaining in possession thereof as aforesaid waived the said condition or breach. 5. Further, in the alternative the plaintiff, whilst still denying the alleged breach and that the defendant has suffered damage, brings into Court the sum of 50 guineas and says that the same is sufficient to satisfy the defendant's counterclaim therein."

The case came on for trial before Sankey J. without a jury, and on May 20 the learned judge ordered that judgment should be entered for the plaintiff on the claim for 200*l.* and costs (1) and that judgment should be entered for the defendant on the counterclaim for 225*l.* with costs. (1) It was therefore adjudged that the plaintiff should recover from the defendant on the claim 200*l.* and costs to be taxed (1) and that the defendant should recover from the plaintiff on the counterclaim 225*l.* and costs to be taxed. (1)

The taxing Master allowed the costs of the plaintiff on the claim at the sum of 214*l.* 5*s.* and the costs of the defendant on the counterclaim at 3*l.* 0*s.* 5*d.*

The defendant carried in objections to the taxation. Her reasons for objecting were the following :—

"The principle on which the Master has taxed the costs of the parties has resulted in the deprivation of the defendant of the whole of the costs of an issue which was the only issue of fact between the parties and was common to both claim and counterclaim notwithstanding the fact that the defendant succeeded on that issue and obtained judgment upon the basis

(1) The judgments were in Form No. I.A in the Appendix F to the Rules of the Supreme Court appropriate where the party against whom judgment is given is a married woman.

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of that issue being decided in her favour. The Master has treated the whole of the defendant's costs (with the exception of a part of the items relating to the instructions for drawing and copying the defence and counterclaim and giving certain consents to extensions of time and perusing the counterclaim) as if they were incurred solely in connection with the claim. The costs of the defendant comprise items incurred partly in support of the defence to the action and partly in support of the counterclaim, and it is submitted that the Master ought to have apportioned the costs so incurred and to have apportioned similar items in the plaintiff's bill. The items generally consist of brief on trial, fees to counsel and subpoena, and allowances of witnesses and allowances to them for attendance at the trial.

"The defendant has not in these objections set out in detail the various items complained of as, assuming her contention is correct, the bill of costs will practically have to be retaxed, and the defendant objects to the general principle on which the costs have been taxed."

In answer to these objections the Master stated : 1. "Where there is a claim and counterclaim the principle upon which the costs are to be taxed is that laid down in *Atlas Metal Co. v. Miller* (1) 'The costs of the action ought to be taxed as if there were no counterclaim.' Consequently whether the plaintiff or the defendant is given the costs of the action the taxing Master has to inquire with regard to each item, Is this an item which would have been reasonable if there had been no counterclaim ? So far as any item fails either wholly or as to part to stand that test the amount so failing must be taken off as not being costs of action. Similarly where either party is given the costs of counterclaim, the taxing Master has to inquire with regard to each item actually incurred, Is this an item which was incurred by reason of the counterclaim ? So far as any item fails to stand that test the amount so failing must be taken off as not being costs of counterclaim for 'No costs not incurred by reason of the counterclaim can be costs of the counterclaim' ; and a portion of costs not in

(1) [1898] 2 Q. B. 500, 504, 505.

fact incurred at all cannot be such costs. Counterclaims cost in fact less than independent actions for the same cause and the party who has to pay the costs of a counterclaim gets the benefit of the cheaper procedure.

2. "Items which are common to claim and counterclaim must be divided by the taxing Master as best he can on the principle above stated, 'but to do so is very different from apportioning what are properly costs of the action. Such costs when ascertained must be paid by the party ordered to pay them. They cannot have been increased by the counterclaim, and no part of them can be properly regarded as costs of the counterclaim.' (1)

3. "As to division of an item. I may take the case of defence and counterclaim. So much of the pleadings as relates solely to the counterclaim I should allow as part of the costs of counterclaim. For instance, in this case I have allowed three folios for drawing, that being the amount which referred solely to counterclaim. I have disallowed a fee to settle counterclaim as that fee would have been the amount allowed for settling defence if there had been no counterclaim and therefore [it was] not incurred by the counterclaim.

4. "If I may give another instance, I have allowed as costs of action the full fee to counsel on his brief as that is the fee I should have allowed if there had been no counterclaim and it was not therefore increased by the counterclaim. Again, the whole of the witnesses were called for defence and their allowances were not increased by the counterclaim. They would have been necessary if there had been no counterclaim.

"The party attending before me did not object to the way in which I had dealt with the items, but to the principle. I overrule the objection."

The defendant appealed to the Judge in Chambers. Roche J., the judge in chambers, made an order that "The taxation of the costs herein be referred back to the taxing Master with the instructions indicated on the answer to objections." The indications given by the learned judge were these: In

(1) [1898] 2 Q. B. 506.

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C. A. the margin of para. 2 of the answer he had written,
 1920 "This principle in my view requires a more extensive applica-
 CHRISTIE tion in this case." In the margin of para. 4 he had
 v. written, "This appears to me to be wrong in principle, the
 PLATT. question being what was the fee paid for. It is clear in my
 view that it was paid and received both to support the claim
 and to oppose the counterclaim. I regard the defendant's
 counsel's fees as similarly divisible. Some of the witnesses
 on both sides seem, as far as I can judge, to be rather witnesses
 on the counterclaim."

From this order the plaintiff appealed.

Barrington-Ward K.C. and *Basil Watson* for the appellant.
 The taxing Master proceeded on the right principle. The
 appellant was given the costs of the action, that is to say the
 costs of proving the claim and incidentally of disproving the
 defence. "In considering what are costs of the action the
 counterclaim, as distinguished from the defence, ought to
 be disregarded. The costs of the action ought to be taxed
 as if there were no counterclaim": *Atlas Metal Co. v. Miller* (1),
 per Lindley L.J. delivering the considered judgment of the
 Court of Appeal. If there were no counterclaim in the present
 case the appellant must have been allowed the full fee to
 counsel on his brief and the costs of all the witnesses she called
 upon the issue whether the premises were habitable, because
 this was an issue in the action.

[*Baines v. Bromley* (2) and *In re Brown* (3) were also cited.]

Inskip K.C. and *Sir H. Cassie Holden* for the respondent.
 Both *Baines v. Bromley* (2) and *In re Brown* (3) support the
 view of Roche J. that costs which are common to both claim
 and counterclaim should be apportioned. The taxing Master
 has misconceived the effect of *Atlas Metal Co. v. Miller* (1)
 which is really not in conflict with those cases.

[ATKIN L.J. The passage which raises the difficulty is
 this: "All the authorities agree so far, i.e., they all decide
 that a plaintiff who is to pay or be paid the costs of his action

(1) [1898] 2 Q. B. 500, 504.

(2) (1881) 6 Q. B. D. 691.

(3) 23 Ch. D. 377.

is to pay or be paid the whole of such costs as if there were no counterclaim." (1)]

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That is explained by the facts of the case. The plaintiffs had lost on the claim and judgment was entered for the defendants on the claim with costs; and yet the taxing Master had allowed the plaintiffs term fees and fees for attendances on summonses. Where an appeal and cross-appeal were both dismissed with costs and, there being but one brief on the appeal and cross-appeal, the taxing Master disallowed the costs of brief and fees charged in the appellants' bill but allowed the costs of brief and fees charged in the respondent's bill, it was held that these costs ought to be apportioned: *Jones v. Stott*. (2) The same principle must apply to an action and cross-action.

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Barrington-Ward K.C. in reply.

ATKIN L.J. This is an appeal from the decision of Roche J. on a review of taxation in an action in which the plaintiff claimed two months' rent of furnished premises in London. The defendant in her defence did not admit the agreement of tenancy, and went on to allege an implied term of the tenancy that the premises should be reasonably fit for occupation, and a breach of that implied term. This was pleaded as a defence to the action for rent. Then the defendant repeated this allegation of the implied term, and further stated that she lost the benefit of the tenancy agreement after having paid 200*l.* rent, and counterclaimed damages for breach of the implied term. At the trial of the action before Sankey J. the plaintiff contented herself by simply proving the agreement of tenancy and the rent due, and left the defendant to make out her case. Sankey J. held that the plea was no defence to the claim for rent, but that there was an implied term that the premises should be habitable and a breach of that term by the plaintiff, and in the result he gave judgment for the plaintiff for 200*l.* and costs on the claim for rent and for the defendant for 225*l.* and costs on the counterclaim for damages. Beyond all doubt the substantial issue

(1) [1898] 2 Q. B. 505.

(2) [1910] 1 K. B. 893.

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which caused the expense was the issue whether or not there was a breach of the implied term that the premises should be habitable. The Master has taxed the costs. To state his conclusion is enough to show that there is some flaw in his reasoning. He has taxed the plaintiff's costs at 21*l.* 5*s.*, and the defendant's costs at 3*l.* 0*s.* 5*d.*; and the defendant, who won on the issue involving nearly all the expense, is allowed 3*l.*, while the plaintiff who succeeded on an unopposed allegation recovers 21*l.* That must be wrong.

When objections were taken to the taxation the Master in his answer relied on *Atlas Metal Co. v. Miller*. (1) After citing a passage from that case that "the costs of the action ought to be taxed as if there were no counterclaim," he states how he arrived at his conclusion. He says "I have allowed three folios for drawing"—the counterclaim—"that being the amount which referred solely to counterclaim. I have disallowed a fee to settle counterclaim as that fee would have been the amount allowed for settling defence if there had been no counterclaim and therefore [it was] not incurred by counterclaim." He goes on to say "If I may give another instance, I have allowed as costs of action the full fee to counsel on his brief as that is the fee I should have allowed if there had been no counterclaim and it was not therefore increased by the counterclaim."

In my view the position he ought to have taken up is this: He got an order that the plaintiff should recover 200*l.* and costs to be taxed and that the defendant should recover 225*l.* and costs to be taxed. In one sense he must tax the costs of the claim on the footing that there is no counterclaim, and the costs of the counterclaim on the footing that there is no claim; but that is subject to this overriding condition, that he must ascertain what are the costs really incurred by the plaintiff in establishing his claim and really incurred by the defendant in establishing his counterclaim. When that has been done then any costs saved to the defendant, by reason of there being a claim and counterclaim instead of two separate and distinct proceedings commenced by

(1) [1898] 2 Q. B. 500.

two separate writs and conducted as two separate actions, are not to be allowed to the defendant, because they are not costs incurred by the defendant, but saved to him. Take for example the term fees mentioned in *Atlas Metal Co. v. Miller* (1); if in that case there had been judgment for the defendants on the counterclaim with costs and the Master had allowed term fees in their bill of costs, there, inasmuch as the defendants instead of having incurred had been spared those fees, it would have been wrong to allow them those fees in their bill of costs. To that extent the costs of a counterclaim are to be taxed as if there were no claim, and the costs of a claim are to be taxed as if there were no counterclaim; but it must be remembered that the Master has to ascertain what costs have in truth and in fact been incurred by the plaintiff in bringing and prosecuting the action and what costs have in truth and in fact been incurred by the defendant in litigating the counterclaim. In the present case, of the costs incurred by the plaintiff some were incurred because he had to bring an action for rent; but others were incurred because he had to oppose a counterclaim. These latter were not his costs of the action but are his costs of the counterclaim. The same principle applies when the question is, What are the defendant's costs of the counterclaim? The Master rightly accepted the view that such costs as are common to both claim and counterclaim are to be divided; but when he finds a set of costs which may be common to both claim and counterclaim and finds that the plaintiff is not charging any more than he would if there was no counterclaim, he allows the plaintiff all he claims. That is wrong. The question is, Did the plaintiff incur all those costs because of his claim? If they were incurred in part on account of the claim and in part on account of the counterclaim, the plaintiff cannot have them all. Take the case of counsel's brief at the trial. There is one brief and one fee, but the brief is to support the claim and to resist the counterclaim, and the fee is for both services. It cannot be said that the plaintiff has incurred the whole fee on account of the claim; that

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(1) [1898] 2 Q. B. 500.

C. A. would mean that he pays his counsel no fee for defending
1920 him against the counterclaim. It may be that counsel would
CHRISTIE charge one fee, but that is irrelevant ; in fact he has performed
v two services, and the single fee remunerates him for both
PLATT. services. How the fee is to be apportioned in each case
Atkin L.J. the Master must decide to the best of his ability in the
circumstances in each case. The fee is subject to adjustment.
In the present case it has not been in fact adjusted. The
Master must say how much of the fee is fairly attributable
to the claim and how much to the counterclaim.

Then as to the witnesses. Did the plaintiff incur the
expense of calling evidence reasonably with a view of supporting
her claim for rent ? Or was the expense incurred really to
meet the counterclaim ? If so, the expense was not properly
attributable to the claim. If it was incurred on both accounts
it ought to be apportioned between them. The Master has
taken a wrong view of the purpose and object of the
defendant's witnesses. He reasoned thus : The defendant
pleaded the breach of the implied term as a defence to the
plaintiff's claim for rent ; therefore the expense of proving
the breach is attributable to the claim. The result of this
reasoning is that he has imputed these costs to an irrelevant
plea and has allowed them no part or share in establishing
a relevant and substantial counterclaim. This has produced
a miscarriage of justice.

The authorities bear out the opinion I am expressing.
I need only refer to two of them. The first is *In re Brown*. (1)
The claim in that case was by a builder against a sub-con-
tractor for a debt, and there was a counterclaim for damages
for breach of the sub-contract. Judgment was given for
the plaintiffs, the executors of the builder who was then dead,
for the amount of the debt and for the sub-contractor for
damages on the counterclaim for an amount larger than the
debt. A direction was given to a taxing Master to tax, first,
the costs of the plaintiffs ; secondly the costs of the defendant
of his counterclaim ; and it was ordered that the amount
of the first mentioned costs should be set off against the

amount of the second mentioned costs. The question was on what principle the costs common to both proceedings were to be disposed of. The taxing Master had allowed in the plaintiffs' bill all the items common to the action and counterclaim. The defendant contended that these items ought to be apportioned. Baggallay L.J. quoted with approval the words of Brett L.J. in *Baines v. Bromley* (1): "I have, however, a firm opinion that where there is a claim with issues taken on it and a counterclaim, not a set off, but in the nature of a cross-action with issues on it, and where the plaintiff succeeds on the claim and the defendant on the counterclaim, the proper principle of taxation, if not otherwise ordered, is to take the claim as if it and its issues were an action, and then to take the counterclaim and its issues as if it were an action, and then to give the allocatur for costs for the balance in favour of the litigant in whose favour the balance turns. In such a case where items are common to both actions the Master would divide them." Baggallay L.J. continues in his own words: "He then draws a distinction between the case where there is a counterclaim or separate action and where the so-called counterclaim is by way of set off only, in which case there is only one action, and the decision arrived at was, as I have before mentioned, that the plaintiff was entitled to the general costs of action." Then follows a very important passage. "Apart from the authority of that case"—i.e., *Baines v. Bromley* (2)—"it appears to me that the principle of *Saner v. Bilton* (3), although that was a case where both parties failed, should be equally applicable to a case where both parties have succeeded. The plaintiff should recover from the defendant the costs of action, except so far as they are attributable to the counterclaim, and the defendant should recover from the plaintiff the costs of the counterclaim. If there are any costs which can be properly considered common to both suits, e.g., a brief fee, if there is only one brief on the claim or counterclaim—or the fees of assessors, or those on a

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(1) 6 Q. B. D. 691, 695.

(2) 6 Q. B. D. 691.

(3) (1879) 11 Ch. D. 416.

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reference, or other items which can be fairly considered to be common to both proceedings, they should be divided.” The other authority I would refer to is *Atlas Metal Co. v. Miller*. (1) It is important to remember how the dispute arose in that case. The plaintiffs, the company, brought an action for damages for libel. The defendants pleaded a justification and counterclaimed for damages for a libel by the plaintiffs upon them. Judgment was entered for the defendants on the claim with costs and for the company on the counterclaim with costs. These two actions were quite separate and distinct. There was no common evidence. The defendants carried in objections to the taxation on the ground that “The Master has taxed the costs of both parties as though there had been two separate and distinct actions, and has allowed attendances on summonses, general attendances, term fees, instructions for brief, fees to counsel thereon, attendances in Court, copies of documents, etc., to both parties, the result being that, although the defendants succeed, they are deprived of the general costs of the action.” These objections came before the Court of Appeal, Lindley and Chitty L.JJ., who held that the Master had proceeded upon a wrong principle. The Court expressed the view that there was no conflict among the authorities cited, which included *In re Brown* (2), and it is plain that the Court had no intention of overruling that case. Lindley L.J., who delivered the judgment of the Court, said (3): “All the authorities agree so far, i.e., they all decide that a plaintiff who is to pay or be paid the costs of his action is to pay or be paid the whole of such costs as if there were no counterclaim.” That is so in a sense; but it must be remembered that “costs of his action” means the costs which he has in truth incurred in that action. The counterclaim cannot be ignored altogether, because some of the costs in the litigation may in truth have been incurred in the counterclaim. As Lindley L.J. said (3): “Next, as to the counterclaim. The defendant has to pay the costs of this, and the counterclaim is to be treated as

(1) [1898] 2 Q. B. 500.

(2) 23 Ch. D. 377.

(3) [1898] 2 Q. B. 505.

an independent cause of action, and, to use Lord Esher's words, as if the claim did not exist. This last expression, however, is calculated to mislead, if not explained and properly understood. What are costs of a counterclaim? The answer must be the costs occasioned by it. No costs not incurred by reason of the counterclaim can be costs of the counterclaim. The fact that if there had been no action the costs of the counterclaim would have been larger, because the defendant would then have had to issue a writ and take other proceedings, does not make costs not incurred costs incurred, and in considering what the costs of a counterclaim really have been in any particular case, the costs saved by not bringing a cross-action cannot be treated as costs incurred." Further on he said (1): "But, as pointed out by Lord Esher (2), there may be costs brought in for taxation which have been incurred partly in support of or in opposition to a defence, and partly in support of or in opposition to a counterclaim, e.g., where there is a defence of set off equal to the plaintiff's demand, and a counterclaim for more than the plaintiff's demand. In such cases the taxing Master must apportion the costs as best he can, and fix the amount applicable to the defence and the amount applicable to the counterclaim." A proper consideration of the principles there laid down, and those which I have stated are the same, lead to the conclusion that the lines on which the Master proceeded were not the correct lines. The matter must be sent back to him that he may award how much in the plaintiff's bill of costs was incurred by the plaintiff in supporting her claim and how much of the defendant's bill of costs was incurred in supporting her counterclaim, and as this was the view taken by the learned judge this appeal must be dismissed.

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YOUNGER L.J. I agree so completely that I refrain from adding anything which might be taken to modify what Atkin L.J. has said. The taxing Master has gone wrong

(1) [1898] 2 Q. B. 506.

691; *Shrapnel v. Laing* (1888) 20(2) See *Baines v. Bromley* 6 Q. B. D. Q. B. D. 334.

C. A. in assuming that the effect of an order that the plaintiff
 1920 shall recover on the claim with costs and an order that the
 CHRISTIE defendant shall recover on the counterclaim with costs is
 v. to give the plaintiff such a position of priority that the taxation
 PLATT. of the two sets of costs must be on wholly different principles.
 Younger L.J. As Fletcher Moulton L.J. pointed out in *Jones v. Stott* (1)
 that is an erroneous assumption in the case of an appeal
 and a cross-appeal. In my view it is equally erroneous in
 the case of an action and a cross-action.

Appeal dismissed.

Solicitors for appellant : *Finnis, Downey, Linnell & Chessher.*
 Solicitors for respondent : *Joynson-Hicks & Co.*

W. H. G.

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Emergency Legislation—Landlord and Tenant—Dwelling-house—Recovery of Possession—Landlord an Ex-soldier—Reasonably sufficient Accommodation for “tenant”—Tenant’s Lodgers—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 5, sub-s. 1 (f); s. 12, sub-s. 1 (f) (g).

County Court—Practice—Payment into Court by Defendant—No Denial of Liability—Judgment for Defendant—Payment out to Defendant—Jurisdiction—County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 107, 164—County Court Rules, Order IX., r. 12, sub-r. 1; r. 13, sub-rr. 1, 5.

The landlord of a dwelling-house, who had purchased it after service in His Majesty’s forces during the war, brought an action in the county court under the Increase of Rent, &c. (Restrictions), Act, 1920, s. 5, sub-s. 1 (f), against the tenant for recovery of possession of the house for his personal occupation and offered the tenant accommodation in the same house. The tenant, a widow, was herself in occupation of the house with members of her family and two lodgers. She had fully furnished the house with her own furniture, and had for some years continuously let furnished lodgings on which she was in part dependent for her livelihood:—

Held, that the Court, in considering pursuant to the above clause whether the accommodation offered to the tenant was reasonably sufficient in the circumstances, was entitled to have regard not only

to the tenant herself and the members of her family, but also to her lodgers.

A landlord brought an action in the county court under the Increase of Rent, &c. (Restrictions), Act, 1920, s. 5, sub-s. 1 (f), for recovery of possession of a dwelling-house and mesne profits. The tenant, who took the view that the tenancy had not been determined and who ought not therefore to have made any payment into Court, by a slip paid into Court a sum which represented the rent for which according to her view she was liable, but included no sum in respect of costs, the payment being made without any denial of liability or defence of tender. The county court judge gave judgment for the defendant with costs, and directed that the money in Court should be paid out to her. The defendant undertook to pay the rent due. On appeal:—

Held, by Lush J., that as the defendant had paid the money into Court without a denial of liability the judge had no jurisdiction to direct that it should be paid out to any one except the plaintiff; but that in the circumstances there was no practical purpose to be served by reversing the order of the judge on this point and ordering the defendant to repay the money to the plaintiff, she having undertaken to pay to him the rent due.

Held, by McCardie J., that the judge had jurisdiction to direct that the money should be paid out to the defendant, and that in the circumstances he had rightly directed that it should be paid to her.

Brown v. Feeney [1906] 1 K. B. 563, principle applied by McCardie J.

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APPEAL from Southampton County Court.

In March, 1916, the plaintiff, Frank Chiverton, a ship's carpenter, joined His Majesty's forces, when he had to give up the house which he rented and store his furniture, and his wife had to live with her parents. In April, 1919, the plaintiff received his certificate of demobilisation after having served continuously in the air forces in this country and also in France. The plaintiff and his wife had not since been able to find accommodation which was reasonably sufficient for them.

On September 1, 1919, the plaintiff purchased a house, No. 51, Newcombe Road, Southampton, which contained two sitting-rooms, three bedrooms, and a combined kitchen and scullery, with a view to living in it and taking his furniture there from storage.

At and for some time before that date, the defendant, Mrs. Ede, a widow, had occupied the last-mentioned house on a monthly tenancy at a rent of 2*l.* 3*s.* 4*d.* a month. The defendant's household consisted of herself, her daughter

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aged nineteen, her son aged seventeen, and weekly lodgers by keeping whom she in part maintained herself. She had fully furnished the house with her own furniture.

After having bought the house, the plaintiff saw the defendant for the first time, when he told her that he wanted one sitting-room and one bedroom both unfurnished and the joint use of the kitchen and scullery for himself and his wife, and made an offer to the defendant of the rest of the house as accommodation for her.

The defendant declined the plaintiff's offer and, her lodgers having left, she took two other weekly lodgers, a husband and wife, whom she provided with fire, light, cooking and attendance for 32s. a week.

On September 26, 1919, the plaintiff gave the defendant notice to quit the house on November 1, 1919.

The defendant paid rent down to the latter date, but refused to quit the house. She had ever since been willing to pay rent at the above rate from that date and had more than once offered to do so, but the plaintiff refused to accept any payment lest by doing so he should admit that the tenancy continued after that date.

On July 26, 1920, the plaintiff brought this action against the defendant in the county court claiming possession of the house as from November 1, 1919, and mesne profits at the rate of 2*l.* 3*s.* 4*d.* a month from the last-mentioned date until hearing or judgment.

The defendant paid into Court a sum of 19*l.* 10*s.*, representing 2*l.* 3*s.* 4*d.* a month from November 1, 1919, to August 1, 1920, without any denial of liability or defence of tender. The plaintiff did not take the money out of Court.

On August 10, 1920, the action was tried in the county court. The above facts were proved or admitted. The defendant further stated in evidence that she would not live in the same house as her landlord, that she could not give the plaintiff two unfurnished rooms as her house was already over-furnished, that she had had lodgers continuously, and that she would not leave the house unless she got another suitable in every way to her circumstances.

The county court judge in giving judgment said in effect that the question was whether, under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5, sub-s. 1 (f) (1) the accommodation offered by the plaintiff to the defendant was reasonably sufficient in the circumstances, and whether the Court considered it reasonable to make the order for possession. The house had two sitting-rooms, three bedrooms, and a combined kitchen and scullery. The defendant was living in the house with a grown-up son and a grown-up daughter. She had in the house furniture sufficient for a larger house. For a considerable time she had been in the habit of letting rooms to lodgers from whom she got 32s. a week. The plaintiff wanted two rooms and the joint use of the kitchen, and offered the defendant the rest of the house. Even supposing that she could get rid of her lodgers and squeeze the furniture into four rooms, it would not be reasonable to require her to do so. That being so, the accommodation offered could not be considered reasonably sufficient in the circumstances. There must be judgment for the defendant with costs, and the money in Court would be paid out to her.

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The plaintiff appealed.

The county court judge, on being asked for a note for the purposes of the appeal, supplied the note taken by him at the trial; and for the further information of the Court he appended a supplementary statement in writing in which he observed that he had fully considered all the matters brought to his notice, in particular the plaintiff’s position as a soldier

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5: “(1.) No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejection of a tenant therefrom, shall be made or given unless—

house for his personal occupation and offers the tenant accommodation on reasonable terms in the same dwelling-house, such accommodation being considered by the court as reasonably sufficient in the circumstances;

“(f) the landlord became the landlord after service in any of His Majesty’s forces during the war and requires the

“and, in any such case as aforesaid, the court considers it reasonable to make such an order or give such judgment.”

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who had served during the war, and in the result the plaintiff (who bought the house without previous communication with the tenant, and long after the existence of the Rent Restriction Acts legislation had become a matter of notoriety) entirely failed to satisfy him that he was entitled to an order; that he was of opinion that the accommodation which would be left for the tenant if the plaintiff succeeded was not in the circumstances reasonably sufficient, and that an order which would necessarily break up the household as it existed and oblige the defendant to send some of her furniture to a warehouse would not be justified, and that indeed he thought the house was undesirably full already; that it was occupied and used just as it had been for a considerable time, and it was not a case where the letting of lodgings had been started in order to defeat the plaintiff; that if the view which he (his Honour) took on the question of fact was right, the rest of the order seemed to follow as of course; that there was no application to amend by adding an alternative claim for rent, which, on terms, he might have thought it right to allow; that as his particulars of claim showed, the plaintiff brought the action to recover possession as at the date when the notice to quit expired and mesne profits from that date; that his entire claim was based on the defendant being as from November 1 wrongfully in possession, in which case the money remedy was not rent, but mesne profits, i.e., damages, the foundation whereof was a wrongful retention of possession after determination of the tenancy; that if the plaintiff had succeeded in his main claim for possession, he would of course have been entitled to the mesne profits also claimed; but, the claim to possession failing, a tenancy still subsisted, either the old one or a new statutory tenancy, with the result that the rent was recoverable as from November 1, if not paid without action; that the plaintiff having recovered nothing on his claim, the money in Court was ordered to be paid out to the defendant who brought it in; and that the question whether or not the plaintiff could have taken the money out of Court before the hearing did not in the circumstances appear to arise for consideration.

du Parcq for the plaintiff. The county court judge was wrong in holding that the plaintiff was not entitled to judgment for possession of the house as from November 1, 1919, when the notice to quit expired, and to mesne profits as from that date. Under the Increase of Rent, &c. (Restrictions), Act, 1920, s. 5, sub-s. 1 (f) (1), an order or judgment for possession of a dwelling-house to which the Act applies may be made or given where the landlord became the landlord after service in any of His Majesty's forces during the war and requires the house for his personal occupation and offers the tenant accommodation on reasonable terms within the same dwelling-house, such accommodation being considered by the Court as reasonably sufficient in the circumstances; and where the Court considers it reasonable to make the order or give the judgment. The clause no doubt gives the Court a wide discretion in considering whether the accommodation offered is sufficient; but the Court must exercise that discretion reasonably and properly. The Court in the exercise of its discretion is no doubt entitled to require that the accommodation offered shall be sufficient not only for the tenant as an individual, but also for the members of his family and other relations usually resident with him. It is not, however, entitled to require that the accommodation offered shall be sufficient for the weekly lodgers of the tenant, of whom he can at any time get rid by giving them a week's notice to quit; or that it should be sufficient to accommodate all the furniture which the tenant may happen to have in the house. In the present case judgment for possession of the house should have been given in favour of the plaintiff if the accommodation offered to the defendant was considered by the county court judge as reasonably sufficient in the circumstances. The accommodation offered consisted of the whole house with the exception of one sitting-room, one bedroom, and the joint use of the kitchen. The judge in considering whether that accommodation was reasonably sufficient should have had regard only to the needs of the defendant and her family. If he had had regard to their needs only he must have

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(1) Note (1) ante, p. 33.

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considered the accommodation sufficient. It was because he took into account the defendant's lodgers and her furniture that he considered the accommodation not reasonably sufficient. In taking these matters into account he misdirected himself, and came to a wrong conclusion, and his judgment should be reversed or a new trial ordered.

The county court judge was wrong in directing that the money paid into Court by the defendant should be paid out to her. The payment of the money into Court by the defendant without any denial of liability was an admission pro tanto of the plaintiff's claim, and the judge ought therefore to have directed that it be paid out to the plaintiff: see County Courts Act, 1888, s. 107 (1); County Court Rules, Order IX., r. 12, sub-r. 1; *Dumbelton v. Williams* (2); and *Hennell v. Davies*. (3) The case of *Gray v. Bartholomew* (4), in which the bulk of the money which the defendant had paid into Court without a denial of liability was directed to be paid out to him, is distinguishable, because it was an action in the High Court where the Rules of the Supreme Court, Order XXII., r. 5, directs that in a case of that kind the money shall be paid out to the plaintiff "unless the Court or a judge shall otherwise order." As the defendant purported to pay the money into Court as rent and not in respect of the plaintiff's demand for mesne profits; and as the money did not include the costs incurred by the plaintiff up to the time of the payment in as required by the rules, the plaintiff was justified in treating the money as irregularly paid into Court and in not taking it out before the trial. The plaintiff is entitled to an order for payment to him of the money in Court together with his costs up to the time of the trial.

R. Goddard for the defendant. The plaintiff is not entitled to appeal against the decision of the county court judge in so far as he held that the plaintiff was not entitled to the relief which he claimed—namely, possession of the house

(1) Note (1) post, p. 41.

(2) (1897) 76 L. T. 81.

(3) [1893] 1 Q. B. 367.

(4) [1895] 1 Q. B. 209.

and mesne profits. The Act of 1920, s. 5, sub-s. 1 (1), provides that no order or judgment for possession of any house shall be made unless (inter alia) the Court "considers it reasonable to make such order or give such judgment." The sub-section confers upon the Court full and unfettered discretion to consider whether in all the circumstances it would be reasonable to give judgment for possession of the house. In the present case the county court judge in the exercise of that discretion rightly took into account the hardship which the defendant would suffer if she was obliged to send away the lodgers on whom she was partly dependent for her livelihood, the difficulty she would find in accommodating all her furniture in four rooms, and the inconvenience of sharing the kitchen with the plaintiff.

The county court judge rightly directed that the money in Court should be paid out to the defendant. The plaintiff took the view that the tenancy was determined on November 1, 1919, and his claim was for possession and mesne profits as from that date. The defendant took the view that the tenancy was not determined and that she continued to be liable for rent, and she paid into Court the sum in question in respect of rent as from the last-mentioned date. The plaintiff was not entitled to take the money out of Court because it was not paid in in satisfaction of his demand. Moreover, he was not entitled to take the money out of Court, because at the trial he wholly failed to make out his case. The plaintiff might at any time before the hearing have taken the money out of Court as rent, but he would not, as by doing so he would have admitted that the tenancy continued, and that his cause of action failed. In these circumstances the only possible course was to direct that the sum in Court should be paid out to the defendant. If the decision of the county court judge be reversed on this point, and the sum in Court be regarded as mesne profits and directed to be paid out to the plaintiff, he will recover no greater sum than the defendant has all along been willing to pay him as rent, and the only practical difference will be that he will get a small amount of costs.

(1) See note (1) ante, p. 33.

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The defendant could not have paid this sum into Court with a plea of tender, because the claim was for mesne profits which the defendant never tendered.

LUSH J. This is an appeal from the Southampton County Court in a case which raised questions of some importance under the Increase of Rent, &c. (Restrictions), Act, 1920. The facts are somewhat unusual. The plaintiff served in His Majesty's forces during the war. On his return to civil life in 1919 he bought the dwelling-house in question, which is admittedly within the Act, as a residence for himself and his wife. The house was at that time let to the defendant, a widow, who took lodgers. It was completely occupied by her, her son and daughter, and two lodgers, and it was fully furnished with the defendant's furniture. The plaintiff required two unfurnished rooms and the joint use of the kitchen, and he offered the defendant the rest of the house for her accommodation. The defendant declined the offer, and, her lodgers having left, she with the knowledge that the plaintiff wanted part of the house took two other lodgers. The plaintiff gave the defendant notice to quit on November 1, 1919, and, the defendant not having complied with the notice, the plaintiff brought this action against her in the county court for possession of the house and mesne profits as from the last-mentioned date.

I will deal first with the question whether the plaintiff is entitled to possession of the house. The Act of 1920, s. 5, sub-s. 1 (f), provides in effect that an order or judgment for the recovery of possession of any dwelling-house to which the Act applies may be made or given where the landlord became the landlord after service in any of His Majesty's forces during the war, and requires the house for his personal occupation, and offers the tenant accommodation in the same dwelling-house, "such accommodation being considered by the Court as reasonably sufficient in the circumstances." The enactment contains the further condition that "the Court considers it reasonable to make such an order or give such judgment." The question for the county court judge

was whether or not under that provision he should make an order for possession in favour of the plaintiff. He had to consider, first, whether under the clause the accommodation offered by the plaintiff to the defendant was reasonably sufficient in the circumstances; and secondly, whether on the whole it was reasonable to make the order for possession. The judge held that it was not reasonable to make an order for possession, and he gave his reasons for coming to that conclusion. These appear both from the note of his judgment, which was taken at the time when it was delivered, and also in the further statement which he made on being asked for a note of the proceedings. [His Lordship read the note of the judgment and the further statement and continued:] The meaning of these statements seems to me to be obvious. The judge found that the defendant had for a considerable time followed the occupation of letting furnished lodgings, which brought her a substantial sum each week and upon which she was largely dependent for her livelihood. He also found that if the plaintiff was allowed to have two rooms in the house the accommodation which would be left for the defendant would not be sufficient to enable her to keep her lodgers. He therefore held that that accommodation was not reasonably sufficient for the defendant in the circumstances, and he refused to make an order for possession in favour of the plaintiff.

It is said on behalf of the plaintiff that the county court judge put an erroneous construction upon s. 5, sub-s. 1 (f), in taking it to mean that he was entitled to consider whether the accommodation offered by the landlord to the tenant is reasonably sufficient not only for the tenant himself, but for the tenant and various other persons also, and that the result of that erroneous view was that he misdirected himself as to the meaning of the section and wrongly exercised his discretion thereunder. I do not agree that the judge misconstrued that clause. It seems obvious that the term "tenant" as used in the clause is not limited to the individual tenant. If, for example, the tenant is living in the house with his wife and family, and the landlord offers accommodation

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which is sufficient only for the tenant himself and not for the other members of his family, it cannot be supposed that the clause means that in that case the Court must consider the accommodation sufficient, and can make an order for possession in favour of the landlord if the tenant refuses to accept that accommodation. It seems to me that the clause must be taken to mean that the Court is to consider whether the accommodation offered is reasonably sufficient for the tenant himself and for all those persons who usually and properly reside with him, including lodgers where he is in the habit of taking them.

It is said further that the county court judge was wrong because he took into account the fact that the order for possession if made would oblige the defendant to get rid of some of her furniture. I cannot see that he was wrong in doing so. He found that the defendant had ample furniture to fill the house and was using part of it for the furnishing of lodgings upon which she depended for her support. In the exercise of his general discretion under the clause he considered that it would not be reasonable to make the order asked for which would prevent the defendant from using the furniture for that purpose and deprive her of her means of livelihood. I think that the judge, in considering whether it was reasonable to make the order, was entitled to look at all the circumstances, including the fact that the defendant had this furniture. In coming to the conclusion at which he arrived he had materials upon which to act, and I cannot see that he was deciding inconsistently with any principle of law.

In connection with the plaintiff's other head of claim a curious dispute arose between the parties. The plaintiff, taking the view that the tenancy had been terminated, added to his claim for possession a claim for mesne profits. The defendant, taking the view that the tenancy had not been terminated, did not admit that she owed anything for mesne profits, although she admitted that she owed a sum for rent. That being so, the defendant ought not strictly to have paid any sum into Court. By a slip, however, she paid in a sum

representing the exact amount of the rent from November 1, 1919, to August 1, 1920, without either an admission or a denial of liability. The plaintiff, instead of taking the money out of Court, elected to proceed with the action. The county court judge held that the plaintiff was not entitled to recover anything in respect of his claim for mesne profits, and he gave judgment for the defendant. He also directed that the money in Court should be paid out to the defendant. The plaintiff says that the judge should have directed the money to be paid out to him and not to the defendant. The defendant submits that the judge rightly directed that the money should be paid out to her.

In order to determine this point one must look first at s. 107 of the County Courts Act, 1888 (1), the only section under which payment into Court can be made by the defendant in a county court action. [His Lordship read the section (1) and continued:] It is to be observed that that section

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(1) County Courts Act, 1888, s. 107: "It shall be lawful for the defendant in any action or matter within such time as shall be prescribed, to pay into court such sum of money as he shall think a full satisfaction for the demand of the plaintiff, together with the costs incurred by the plaintiff up to the time of such payment; and notice of such payment shall be communicated by the registrar to the plaintiff by post, or by causing the same to be delivered at his usual place of abode or business; and the said sum of money shall be paid to the plaintiff; but if the plaintiff shall elect to proceed, and shall recover no further sum in the action or matter than shall have been so paid into court, he shall pay to the defendant the costs incurred by him in the said action or matter after such payment; and such costs shall be settled by the court, and an order shall thereupon be made by the court for the payment of such costs by the plaintiff."

County Court Rules, 1903-1920, Order IX., r. 12: "(1.) A defendant who desires to pay money into court pursuant to section one hundred and seven of the Act shall pay the same five clear days at least before the return day. Every such payment shall be taken to admit *pro tanto* the claim or cause of action or complaint in respect of which the payment is made, unless the defendant at the time of paying the money into court files with the registrar a notice according to the form in the Appendix, stating his name and address, and further stating that notwithstanding such payment the defendant denies his liability; The defendant must also pay into court, in respect of the court fees and solicitor's costs (if any) entered on the summons, a sum proportionate to the amount paid in in respect of the claim, unless the payment into court is made under a defence of tender, in which case he may make such payment without costs."

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contains no such words as occur at the end of Order XXII., r. 5, of the Rules of the Supreme Court, which provides that money paid into Court by the defendant may in certain cases be paid out to the plaintiff "unless the Court or a judge shall otherwise order." It may also be noticed that although the section says that it shall be lawful for the defendant to pay the money into Court "together with the costs incurred by the plaintiff up to the time of such payment," the defendant apparently did not pay into Court any sum in respect of the plaintiff's costs, or at least she did not earmark any part of the sum which she paid in as paid for costs. It may further be noticed that, although the section goes on to say that if the plaintiff shall elect to proceed, and shall recover no further sum than shall have been so paid into Court, he shall pay to the defendant the costs incurred by him after such payment, it does not contain any provision as to the costs incurred before the payment into Court. The consequences of a payment into Court under that section appear from Order IX., r. 12, sub-r. 1 (1), of the County Court Rules. [His Lordship read that sub-rule. (1)] As the defendant made the payment into Court without any denial of liability, it necessarily follows by the rule which I have just read that the payment must be taken to admit the claim or cause of action in respect of which it was made, that is, the plaintiff's claim for mesne profits, and I think that this must be so even though the payment in may have been made by inadvertence. The question is to which of the parties should the judge in the circumstances have directed the money in Court to be paid out. Sect. 107 of the Act provides that a sum of money paid into Court by the defendant in satisfaction of the plaintiff's demand "shall be paid to the plaintiff." The plaintiff accordingly says that the money in Court should have been paid out to him. The defendant contends that these words only mean that the money shall be paid out to the plaintiff if he accepts it before the hearing, but that construction involves a qualification of the section which I cannot read into it. In my opinion it was the right

(1) Note (1) ante, p. 41.]

of the plaintiff to have the money paid out to him. He was the person in satisfaction of whose claim it was paid into Court. I cannot see that it belonged to any one else, or that any one else had a right to have it paid out to him, or that there was any possible ground on which the judge could have directed it to be paid out to any one else.

It was further contended on behalf of the defendant that s. 107 provides that it shall be lawful for the defendant to pay into Court a sum in respect of the demand of the plaintiff "together with the costs incurred by the plaintiff up to the time of such payment," that the sum paid into Court by the defendant included nothing in respect of costs, and that therefore this payment into Court was bad. The defendant, however, cannot properly be heard to say that the payment into Court was a bad payment in, and that she is entitled to receive back the money which she had paid into Court to the use of the plaintiff. It must be taken to have been a good payment into Court under s. 107. The judge ought therefore to have directed the money to be paid out to the plaintiff under that section.

As to the judgment which the county court judge should have given, he was no doubt right in giving judgment for the defendant. Where the plaintiff recovers no more than has been paid into Court by the defendant the latter is entitled to judgment. Here the defendant succeeded in her defence to the plaintiff's claim for possession and she had paid into Court a sum sufficient in amount to satisfy his other claim for mesne profits. That being so the judgment in her favour was right, and we cannot disturb it even if she was wrong in making the payment into Court.

Further, it cannot be said that the judge was wrong in giving judgment for the defendant "with costs." Sect. 107 does not say that where the plaintiff recovers no more than has been paid into Court the plaintiff shall have the costs incurred by him before the payment in. It leaves these costs to the discretion of the Court. The judge was acting well within his discretion in deciding that the defendant should have the costs of the action. The decision was right both

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in substance and in form, except only in so far as it directed that the money in Court should be paid out to the defendant.

The plaintiff having appealed, it remains to consider what order this Court should make. If the defendant was not ready and willing to pay to the plaintiff the amount of the money that was in Court, then I think that we ought to make an order directing her to pay it to him. The defendant, however, is not only willing, but has given an undertaking to pay the money to the plaintiff, and it is therefore unnecessary that we should order him to do so.

In my opinion this appeal should be dismissed with costs.

McCARDIE J. I agree in the general conclusion at which my Lord has arrived, although I do not share his view on all the points that arise for consideration in this appeal.

The Increase of Rent, &c. (Restrictions), Act, 1920, s. 5, sub-s. 1 (f), provides in substance that an order for possession of a dwelling-house to which the Act applies, may be made where the landlord became the landlord after service in His Majesty's forces during the war and requires the house for his personal occupation and offers the tenant accommodation on reasonable terms in the same house, "such accommodation being considered by the Court as reasonably sufficient in the circumstances," and provided that "the Court considers it reasonable to make such an order." That provision throws upon the tribunal the duty of exercising its discretion, and it is well in approaching the consideration of it, to bear in mind the words of Jessel M.R. in *In re Taylor* (1), where he said: "When I say 'the discretionary power of the Judge,' I mean that, though the Act of Parliament gave the power in the most ample terms in which language could express it . . . yet, of course, like every other power given to a Judge, the discretion of the Judge is to be exercised on judicial grounds—not capriciously, but for substantial reasons." I conceive, therefore, that the judge in administering the enactment must exercise the discretion which it confers upon him in a judicial manner, having regard

(1) (1876) 4 Ch. D. 157, 159.

on the one hand to the general scheme and purpose of the Act, and on the other to the special conditions, including to a large extent matters of a domestic and social character.

Under the provision in question the judge has to exercise his discretion in considering whether the accommodation which the landlord offers to the tenant in the same house is reasonably sufficient in the circumstances. The measure of the accommodation which should be offered by the landlord in a given case must depend in great measure upon the meaning of the term "tenant" as used in the clause. The term as there used is elliptical. It obviously does not mean the tenant as an individual. It must include the tenant himself and his wife and children who live with him. I think it might properly include other persons also for whom the tenant has to provide accommodation, such as a domestic servant or a relative who is dependent upon him by reason of infirmity or otherwise. I further think that, where the tenant is in the habit of keeping lodgers, there is no reason in law or expediency why the term tenant should not include a lodger of the tenant. The lodger may have resided with the tenant for many years, and may have become old and infirm, and he may or may not be a relative of the tenant. In this case the judge, in considering whether the accommodation was sufficient, properly had regard to the lodgers who were resident with the defendant. Moreover the Court in considering whether the accommodation offered is reasonably sufficient must in every case have regard to all the relevant circumstances, including considerations of health, character, sex, and social amenity. Here it is obvious, even if the defendant's lodgers be left out of account, that the joint use of the kitchen and other premises by the families of the plaintiff and the defendant might tend to give rise to situations of difficulty or delicacy. In my opinion there was ample material to justify the judge in arriving at the conclusion that the accommodation offered by the plaintiff was not reasonably sufficient in the circumstances.

A further question arises in the case on which I think I should express my views, although I regret that they do

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not coincide with those of my Lord. The plaintiff claimed possession of the dwelling-house and mesne profits. The defendant paid into Court the sum of 19*l.* 10*s.* without any denial of liability. The plaintiff did not take the money out of Court, but proceeded with the action. The county court judge held that the plaintiff was not entitled to possession, and therefore that he was not entitled to mesne profits, and he gave judgment for the defendant. The judge further directed that the money in Court should be paid out to the defendant.

The plaintiff contends that when the money was paid into Court he at once became absolutely entitled to it, and that it ought to have been paid out to him. He bases his argument upon s. 107 of the County Courts Act, 1888. (1) [His Lordship read the section (1) and continued:] In my view that section, which is the only section providing for payment into Court by the defendant in a county court action, appears on its face to be strictly limited in operation, and the right of the plaintiff thereunder to the money in Court only exists as a complete right on his receiving notice of the payment in and on his electing to take it out of Court before trial. If the plaintiff receives notice of the payment in of the money and elects to take it out, his right to it is absolute. If, however, he elects not to take it out, but to proceed with the action, then his right to the money is not absolute. In this case the plaintiff did not comply with that section so as to acquire an absolute right to the money in Court, because he did not take the money out of Court, but elected to proceed with the action. Further, the defendant did not comply strictly with the requirements of the section because she did not pay into Court a sum sufficient to cover the costs of the plaintiff up to the time of payment.

In order to understand more fully the position of the parties where the defendant has paid money into Court, regard must be had to Order ix. of the County Court Rules, which are of statutory force. Indeed, s. 107 of the Act ought to be read together with Order ix., r. 12, sub-r. 1. (1) [His

(1) Note (1) ante, p. 41.

Lordship read the sub-rule. (1)] I agree that the provision that every such payment shall be taken to admit pro tanto the claim or cause of action in respect of which it is made, unless the defendant denies his liability, is prima facie of force in all cases. I also agree that Order XXII., r. 1, of the Rules of the Supreme Court, which provides for payment into Court with or without a denial of liability, is very similar to the rule in the county court to which I have just referred, and I appreciate the force of the cases of *Hennell v. Davies* (2) and *Dumbelton v. Williams* (3), which were decided under the Rules of the Supreme Court and no doubt show that if a defendant pays money into Court in the High Court without a denial of liability he must be taken to admit his liability to the plaintiff. It is necessary, however, that s. 107 of the Act of 1888 and Order IX. of the County Court Rules should be considered in connection with the Increase of Rent Act which gives a discretionary power to the judge enabling him in cases where he may properly do so to act otherwise than in accordance with strict legal merits, and the various provisions must be construed in such a way as to make the whole scheme of the legislation as far as possible consistent with itself. It is necessary also to consider r. 13 of Order IX. Sub-r. 1 of that rule provides that if the plaintiff elects to accept in satisfaction of his claim the money paid into Court by the defendant, whether the same has been paid in in due time or not, or with or without costs, or with or without a notice of denial of liability, he shall give a notice stating such acceptance within such reasonable time before the return day as the time of payment by the defendant has permitted. Sub-r. 5 provides that where the plaintiff has not given notice of acceptance in accordance with sub-r. 1, he may nevertheless accept the money paid into Court at any time before the case is called on and opened, subject to payment of defendant's costs since the date of payment into Court. Here the plaintiff did not in the exercise of his discretion elect to take the money out of Court under

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(1) Note (1) ante, p. 41.

(2) [1893] 1 Q. B. 367.

(3) 76 L. T. 81.

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either of these sub-rules. Sub-r. 5 in providing that the plaintiff may accept the money at any time before the case is called on and opened fixes the last moment at which the plaintiff has any right to take the money out of Court. The rules contain no express provisions giving the plaintiff any right to take the money out of Court where he has not accepted it before the case is called on and opened. The case is one which is not specifically provided for by the rules. It is therefore necessary to consider whether there is any provision under which in a case like the present the county court judge could properly direct the money in Court to be paid out to the plaintiff. The relevant provision in this connection seems to me to be s. 164 of the Act of 1888, the last part of which is as follows: "In any case not expressly by this Act or in pursuance thereof provided for the general principles of practice in the High Court of Justice may be adopted and applied to actions and matters." Under that very important provision the power of the county court judge in regard to matters of practice which are not provided for is therefore apparently the same as that of a High Court judge. Unless that principle be applied many of the things done by county court judges would be devoid of foundation. That being so, one has to inquire what power a judge of the High Court has in regard to money which the defendant has paid into Court and which the plaintiff has left there until it is too late to take it out. The case of *Brown v. Feeney* (1), which I have found, was as regards its particular facts a very unusual case, but it lays down a principle of general application, and may usefully be referred to in this connection. The headnote is as follows: "In an action of libel the defendant paid money into Court in satisfaction of the claim, without denying liability. The plaintiff did not take the money out of Court, and proceeded with the action. The action being yet untried, the defendant died, and the action therefore abated. The defendant's executors thereupon applied for an order that the money in Court should be paid out to them: Held, that their application should be refused and the money

(1) [1906] 1 K. B. 563.

paid out to the plaintiff." The Rules of the Supreme Court give the Court no express power of ordering payment out of the money in Court in a case of that kind, and it was therefore necessary to decide what power the Court had, and what the practice should be. In that case Vaughan Williams L.J. said (1): "I do not think that the power is one which necessarily can only be exercised under the rules. In my opinion when money is paid into Court the Court must have power to say what shall be done with it, though circumstances may have ousted the operation of the rules with regard to it." He then stated what order in his opinion the Court ought in the circumstances to make in regard to the money in Court. Stirling L.J. (2), observing that the point had been considered in the Court of Chancery, referred to the case of *Wright v. Mitchell* (3), where after a bill had been dismissed for want of prosecution, the Court made an order for payment out of money in Court to persons who had been defendants in the case; and to another similar case, and added: "The principle of those decisions seems to me to apply to this case, where the action is at an end by reason of the death of the defendant, and cannot be revived. Therefore I think we should have jurisdiction to order this money to be paid out to the defendant's personal representatives; but, in order to justify us in exercising that jurisdiction, I think they ought to show such grounds for depriving the plaintiff of his right as the defendant would have had to show if he had been alive and the action was still in existence. . . ." That is a most important decision, and I think that under s. 164 of the Act of 1888 it may well be regarded as applicable in the county court where, as in the High Court, the rules contain no express provision in regard to payment of money out of Court after the case has come to an end. I therefore think that in the present case the county court judge had power to direct that the money in Court should be paid back to the defendant.

It is true that under Order IX., r. 12, a payment into Court

(1) [1906] 1 K. B. 568.

(2) *Ibid.* 569, 570.

(3) (1811) 18 Ves. 293.



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by the defendant shall be taken to admit pro tanto the claim or cause of action in respect of which it is made. I think, however, that in a case such as the present, that rule must be read in conjunction with s. 5, sub-ss. 1 and 2, of the Increase of Rent, &c., Act, 1920, and must be taken to be subject to the general power given by that enactment to the county court judge of making such an order as he considers to be reasonable in the circumstances. In the present case I think the county court judge was right in the conclusion at which he arrived as regards the money in Court. He would have been wrong if, while holding that the plaintiff was not entitled to succeed on his claim for possession of the house or mesne profits, he had yet given to the plaintiff the sum of 19*l.* 10*s.* which the defendant had paid into Court in respect of the claim.

In my opinion the decision of the county court judge was right in every respect both in substance and in form.

Appeal dismissed.

Solicitors for plaintiff : *T. F. Peacock, Fisher & Chavasse, for F. G. Warne, Southampton.*

Solicitor for defendant : *Nicholls & Co., for Charles Ansell, Emanuel & Emanuel, Southampton.*

J. R.

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Money-lender—Action against Borrower—No Defence of Non-registration—No apparent Illegality—Liability of Money-lender to prove Registration—Money-lenders Act, 1900 (63 & 64 Vict. c. 51), ss. 2, 3—County Court Rules, Order X., rr. 10, 18.

The plaintiff, a money-lender, brought an action in the county court on a promissory note made in her favour by the defendants, who did not deny that the sum claimed had not been paid. The defendants had not given notice that they relied upon the statutory defence that the plaintiff was not registered as a money-lender, and they were therefore prevented from setting up that defence at the trial. Nothing appeared on the face of the transaction between the parties or in the course of the proceedings to suggest that the plaintiff was not registered. The plaintiff's agent gave evidence on her behalf, stating that she was registered, and producing a copy of her return of particulars for registration which he said had been obtained from the registration authorities; and the defendants did not attempt to shake his evidence by cross-examination or otherwise. The county court judge held that the plaintiff must give strict proof of her registration by an examined or certified copy thereof, and, as she had not done so, he gave judgment for the defendants. On appeal to the Divisional Court:—

Held, that in the circumstances it was not necessary that the plaintiff should prove her registration by an examined or certified copy thereof, and that she was entitled to judgment.

In re Robinson's Settlement [1912] 1 Ch. 717, 725, 726 and *North Western Salt Co. v. Electrolytic Alkali Co.* [1914] A. C. 461, 469, 475-6, observations applied.

APPEAL from Mansfield County Court.

In consideration of the loan of 10*l.* by the plaintiff, Bertha Lipton, trading under the description of "B. Lipton," as a money-lender, at Nottingham and other towns, to the defendants, Daniel Powell and Edith Powell his wife, of Langwith, and interest thereon as agreed, the defendants made a promissory note dated January 22, 1920, for 15*l.* payable to the plaintiff.

In July, 1920, the plaintiff brought the present action against the defendants in the county court for 14*l.*, the balance then remaining due upon the promissory note.

The defendants did not pursuant to the County Court Rules, Order x., r. 10, file a notice stating that they intended to rely on a statutory defence, namely, that the plaintiff was

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not registered as a money-lender under the Money-lenders Act, 1900, nor pursuant to r. 18 in their statement sufficiently indicate the nature of the defence on which they relied.

On August 10, 1920, the action was tried in the county court. Peter Reynolds, who was called as a witness for the plaintiff, stated in examination in chief that he was the surveyor for the plaintiff; that he transacted the business in question between the plaintiff and the defendants and attested their signatures to the promissory note; that two instalments of 10s. each had since been paid by the defendants; and that the plaintiff claimed 14*l.* being the balance still due; and the witness then produced the promissory note to the Court. The judge thereupon asked the defendants, who both appeared in person, whether they had any questions to ask the witness, and the male defendant replied that they had not. The said witness was then asked by the judge whether the plaintiff was a registered money-lender, and he replied that she was, and produced to the Court a copy of a return of the registration of the plaintiff as a money-lender, which he said had been obtained by the plaintiff from the Registration Authorities in London. The judge, after scrutinising the document produced, said that it was not a certificate of registration and he was in doubt whether it was a true copy of the return of registration, whereupon the witness Reynolds again said that the document had been obtained by the plaintiff from the said authorities, and was the only return of registration that the plaintiff had. The solicitor who appeared for the plaintiff then asked the witness Reynolds whether he knew as a fact that the plaintiff was registered as a money-lender, and he said that he did. No formal certificate of registration was produced or tendered by or on behalf of the plaintiff. During the proceedings nothing appeared on the face of the documents or in the oral evidence to show or suggest any illegality in the transaction by reason of the non-registration of the plaintiff or otherwise.

It was submitted on behalf of the plaintiff that there was no provision in the Money-lenders Acts that registration must be proved by production of a certificate of registration, and

that it need not be produced except where registration was desired by a defendant ; and that in this case, as the defendant had not alleged that the plaintiff was not registered, and as the copy return as received from the authorities had been produced, and as the witness Reynolds had said on oath that he knew as a fact that the plaintiff was registered, the Court ought to accept the evidence and enter judgment for the plaintiff.

The judge held that the plaintiff must prove her registration as a money-lender under the Act, that the only admissible evidence of registration was a certificate of registration, that the evidence given was only secondary evidence which in the circumstances was not admissible, and therefore that the registration had not been proved, and he gave judgment for the defendants.

The plaintiff appealed on the grounds: (1.) that the judge misdirected himself in requiring the plaintiff to prove registration under the Act of 1900, when the defendants had not pleaded the statutory defence; (2.) that the judge improperly rejected the evidence of Reynolds, and a copy of the return under that Act furnished by the Controller of Stamps at Somerset House, as being insufficient for such proof as aforesaid; (3.) that the plaintiff was taken by surprise when the judge ruled that the copy of the return together with the evidence of Reynolds was not proof of registration under the Act.

Tinsley Lindley for the plaintiff, appellant. The learned county court judge was wrong in giving judgment for the defendant on the ground that the plaintiff was bound to prove her registration as a money-lender under the Money-lenders Act, 1900, and did not do so.

The Act, no doubt, by s. 2 provides in effect that a money-lender shall register himself as such in accordance with the Act, and shall not enter into any money-lending transaction otherwise than in his registered name.

It does not follow, however, that in every case in which a money-lender brings an action in respect of a money-lending

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transaction he can be required to prove that he is duly registered under the Act. It is only in certain cases that the question of his registration can be raised.

One of these cases is that in which the defendant relies upon the statutory defence of the non-registration of the plaintiff and the consequent illegality of the transaction. The defendant cannot, however, rely upon that defence, unless he formally pleads it or obtains leave to amend his defence in order to plead it. In a county court action like that now in question the defendant, in order that he may rely upon that defence, must file notice of it and indicate its nature in his statement, pursuant to the County Court Rules, Order x., rr. 10 and 18, or get leave to amend so as to raise it. Here the defendants did not comply with the rules in these respects, and they are therefore precluded from relying upon that defence and requiring the plaintiff to prove her registration.

Another case in which the question of the plaintiff's registration as a money-lender may be raised is that in which some ground appears on the face of the transaction or in the course of the proceedings for supposing that the plaintiff is not registered and the transaction therefore illegal. In that case, whether the defendant has pleaded it or not, the Court may take notice of the apparent illegality, and if it does so it will refuse to enforce the transaction unless the plaintiff can prove his registration. In the present case no ground whatever appeared on the face of the transaction or during the proceedings for supposing that the plaintiff was not registered. On the contrary, a witness on behalf of the plaintiff gave evidence that she was duly registered, and the defendants asked him no questions in cross-examination. That being so, this was not a case in which the judge could require the plaintiff to prove his registration. *In re Robinson's Settlement* (1) is distinguishable, because in that case there was direct evidence to show that the money-lender was not registered.

[McCardie J. referred to the observations of Lord Haldane L.C. in *North Western Salt Co. v. Electrolytic Alkali Co.* (2)]

(1) [1912] 1 Ch. 717.

(2) [1914] A. C. 461, 469.

Even if the transaction or the proceedings had disclosed a prima facie case of non-registration, the judge before putting the plaintiff to the strict proof of registration should have adjourned the case in order to give her an opportunity of proving her registration.

If in this instance the plaintiff was obliged to prove her registration, she did prove it. Her surveyor stated in evidence that she was registered and produced a copy of her return of particulars for registration which had been obtained from the registration authorities ; and the defendants did not cross-examine the witness or otherwise attempt to shake his evidence. In view of the fact that the plaintiff's registration was never questioned, it was not necessary that she should prove her registration by production of a certificate of registration.

The onus was not upon the plaintiff of proving that she was registered, as the defendant did not plead that she was not registered. If that onus was upon the plaintiff, she discharged it by the evidence which she called.

Malcolm Hilbery for the defendants, respondents. The county court judge was right in giving judgment for the defendants on the ground that the plaintiff had not proved her case.

The Money-lenders Act, 1900, s. 2, provides in effect (sub-s. 1) that a money-lender shall register himself as a money-lender under the Act, that he shall carry on business only in his registered name, and that he shall not enter into any money-lending transaction otherwise than in his registered name ; and (sub-s. 2) that if he fails to register himself he shall be liable to penalties. By virtue of that section, unless a money-lender is duly registered, a money-lending transaction entered into by him is illegal and void : *Bonnard v. Dott* (1), *In re Robinson's Settlement* ; *Gant v. Hobbs* (2), and *Edgelow v. MacElwee*. (3) In an action by a money-lender in respect of a money-lending transaction the transaction must be treated as illegal and void unless the money-lender proves that he is duly registered. It is true that the defendant

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(1) [1906] 1 Ch. 740.

(2) [1912] 1 Ch. 717.

(3) [1918] 1 K. B. 205.

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cannot in general rely upon the statutory defence of the illegality of the transaction by reason of the non-registration of the plaintiff unless he formally raises it, and that in a county court action like that now in question the defendant in order to raise that defence must have given notice of it under the county court rules. The Court, however, whether the defendant has formally pleaded it or not, is entitled and indeed bound to take notice of the *prima facie* illegality by reason of non-registration, to call upon the plaintiff to prove his registration, and, in the event of his failing to do so, to dismiss the action: see *In re Robinson's Settlement* (1); *North Western Salt Co. v. Electrolytic Alkali Co.* (2), and *Edgelow v. MacElwee*. (3) In the present case the transaction in respect of which the plaintiff sued was *prima facie* illegal and unenforceable until the plaintiff proved by satisfactory evidence that she was registered, and the learned judge rightly required her to prove her registration.

The plaintiff was bound to prove her registration by the best evidence. The register is a document of a public nature, and the registration ought therefore to be proved under s. 14 of the Evidence Act, 1851 (14 & 15 Vict. c. 99), by a copy proved by the registrar to be an examined copy, or purporting to be a certified copy, the latter being the more convenient mode of proof. The regulations as to the registration of money-lenders made in 1900 under the Act of 1900 provide that a certified copy of the registration can be obtained for a fee of 1s. and is subject to a stamp duty of 1s. These are the only strictly legal modes of proving the registration. A statement by the money-lender himself that he was registered would no doubt be *prima facie* proof of registration and might possibly be sufficient. The evidence which was given on behalf of the plaintiff in the present case, consisting as it did of a mere statement by her agent that she was registered and production of a document which he alleged to be a copy of her return for registration, was not

(1) [1912] 1 Ch. 717, 726, 728.

(2) [1914] A. C. 461, 469, 475-6.

(3) [1918] 1 K. B. 205.

even prima facie proof of the fact of her registration, and it was rightly rejected by the learned judge.

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The onus was upon the plaintiff of proving that she was duly registered under the Act, and she failed to discharge that onus, inasmuch as she did not produce a certified copy of her registration.

LUSH J. In this case the plaintiff, who is a money-lender, brought an action in the county court against the defendants to recover the unpaid balance of a promissory note made by them in her favour as part of a money-lending transaction. The defendants did not give notice that they intended to rely on the defence that the plaintiff was not registered as a money-lender under the Money-lenders Act, 1900, and that the transaction was therefore illegal. The plaintiff's surveyor or agent was called as a witness on her behalf and proved the carrying out of the transaction and the amount of the claim, and the defendants said that they had no questions to ask him. The witness then stated in reply to the judge, and afterwards to the plaintiff's solicitor, that the plaintiff was a registered money-lender, and he produced a copy of her return for registration which he said had been obtained from the registration authorities. The defendants did not attempt to prove or even suggest that the plaintiff was not registered. The county court judge held that as a certified copy of the plaintiff's registration had not been produced, her registration had not been proved, and he gave judgment for the defendants. From that judgment the plaintiff appeals.

As regards the copy of the return for registration which was produced at the trial, I doubt if it was admissible in evidence as a copy ; but it is not necessary for the purposes of my judgment to rely upon that document and I will assume that it was not in evidence.

The first contention on behalf of the defendants is that the decision of the county court judge was right, inasmuch as on the evidence it must be taken that the plaintiff was unregistered and that the contract between the parties

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was therefore illegal. In order to determine whether that contention is well founded it is necessary to consider whether in this case the objection could properly be taken that the contract was illegal.

As the objection was taken in this instance by the learned judge, I will consider first whether it could properly be taken by him. Where an action is brought upon a contract and the point is not taken by the defendant that the contract is illegal there are two cases in which the judge may intervene and refuse to enforce the contract. One of these cases is that in which the contract *ex facie* shows illegality. Many instances of actions on contracts which are plainly illegal are to be found in the reports. In a case of that kind the Court is entitled and indeed bound to intervene and refuse to enforce the contract, because "No Court ought to enforce an illegal contract . . . if the illegality is duly brought to the notice of the Court": per Lindley L.J. in *Scott v. Brown, Doering, McNab & Co.* (1), adopted by Cozens-Hardy M.R. in *In re Robinson's Settlement.* (2)

The other case in which the judge may refuse to enforce the contract is that in which, although *ex facie* the contract is legal, yet in the course of the proceedings an admission is made or evidence is given by which its illegality clearly appears. If, for example, in an action like the present the plaintiff were to admit that he was unregistered, or the defendant were to give evidence that the plaintiff was unregistered, the illegality would be brought to the notice of the Court, and the Court would refuse to enforce the contract just as if the illegality had appeared upon the face of the contract.

In a case coming within either of these two classes of cases the Court is apprised of the fact that it is being asked to enforce an illegal contract, and it may and ought to refuse to do so.

In the present case how can it be said that the contract which the Court is asked to enforce is either illegal on the face of it, or shown to be illegal by the evidence? The witness

(1) [1892] 2 Q. B. 724, 728.

(2) [1912] 1 Ch. 717, 725.

who was called on behalf of the plaintiff, so far from admitting that there was illegality in the contract, denied it. Not only did he not say that the plaintiff was unregistered, but he swore that she was registered. The defendants never challenged this evidence and the judge did not say that he disbelieved it. It seems clear that it was not in any way brought to the notice of the Court that the transaction was illegal, and I am unable to understand how the contrary could be suggested. There were here no circumstances before the learned county court judge to justify him in taking the point that the plaintiff was unregistered and the transaction consequently illegal.

In the next place, were the defendants entitled to take the point that the contract was illegal by reason, as they alleged, of the non-registration of the plaintiff? They did not take the point at the trial. If they had taken it they would have been met by the objection that it was a statutory defence, which the rules required that they should give notice of and set forth in their pleading, and that they had neither given notice of it nor pleaded it: see County Court Rules, Order x., rr. 10, 18. It cannot be controverted that in an action on a contract, whether in the High Court or in the county court, the defendant cannot rely upon the defence that a contract apparently lawful is illegal unless he pleads it. In *North Western Salt Co. v. Electrolytic Alkali Co.* (1) this point was dealt with by two of the learned lords who decided that case. Lord Haldane L.C. said (2): "My Lords, it is no doubt true that where on the plaintiff's case it appears to the Court that the claim is illegal, and that it would be contrary to public policy to entertain it, the Court may and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal, or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point has not been raised on the pleadings so as to warn the plaintiff to produce evidence which he may be able to bring forward rebutting any presumption of illegality which might

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(1) [1914] A. C. 461.

(2) [1914] A. C. 469.

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be based on some isolated fact, then the Court ought not to take a course which may easily lead to a miscarriage of justice. On the other hand, if the action really rests on a contract which on the face of it ought not to be enforced, then, as I have already said, the Court ought to dismiss the claim, irrespective of whether the pleadings of the defendant raise the question of illegality." Lord Moulton, after referring to the contention of the defendants that if the Court, taking the contract in connection with the facts brought before it at the trial, comes to the conclusion that the contract is illegal it is as a matter of course entitled and bound to dismiss the action, said (1): "This reasoning would be sound in the case of a properly constituted action, where the defence of illegality is duly raised on the pleadings. The Court would then be entitled to assume that it had before it, in evidence, all the relevant surrounding circumstances. . . . In such a case the legal motto, *de non apparentibus et de non existentibus eadem est ratio*, is rightly applied. But it is not so where the issue is not raised on the pleadings. The plaintiffs have received no notice that the point will be raised, and are presumably not prepared with the necessary evidence." It seems plain from these passages that unless the defendant raises the defence of the illegality of the contract on the pleadings, then he cannot rely upon it, and, except where the contract is on the face of it illegal, even the Court has no right to intervene.

These considerations dispose of the main contention of the defendants.

The second contention on behalf of the defendants was that in an action by a money-lender on a contract made in the course of his business, the onus is on the plaintiff of proving that he is duly registered under the Act, and that in the present case the plaintiff did not discharge that onus, and therefore the contract is illegal and the plaintiff is not entitled to recover. It cannot, however, be said that the burden is on the plaintiff of proving the legality of the transaction unless the defendant has pleaded its illegality, which

(1) [1914] A. C. 476.

in this case the defendants have not done. This second contention of the defendants is merely their first contention in another form.

There are two other observations that I desire to make. The first is that even if it had been open to the defendants or to the county court judge to raise the objection that the plaintiff had not duly proved her registration, it would be a miscarriage of justice to give judgment against her because of her mere technical slip in failing to obtain a certified copy of her registration without giving her an opportunity of correcting her mistake and proving her case.

The other observation is that if and when it is necessary for a money-lender to give strict proof of his registration as a money-lender he must give it either by an examined copy of the registration proved to be such by the proper officer, or by a certified copy of the registration.

In my opinion the appeal should be allowed and judgment entered for the plaintiff.

MCCARDIE J. I agree that this appeal should be allowed. [His Lordship briefly recapitulated the facts and the proceedings at the trial, and continued :]

The Money-lenders Act, 1900, s. 2, provides in effect that a money-lender who is not registered under the Act is guilty of carrying on a business which is illegal, and each transaction into which he enters in the course of his business exposes him to criminal proceedings and a substantial penalty.

That being so, it is not unimportant to inquire how far in an action by a money-lender on a contract entered into in the course of his business the objection may be taken that he is not duly registered, and that the contract is therefore illegal. In this connection the right and duty must be considered, both of the defendant who is sued by the money-lender, and of the Court.

In the High Court if a defendant who is sued by a money-lender desires to rely upon the defence that he is not registered, he is bound to observe the requirements of the Rules of the Supreme Court, Order XL., r. 15, which requires

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the defendant to raise by his pleading facts showing illegality either by statute or common law ; and, similarly, in the case of an action in the county court, the County Court Rules, Order x., provide (r. 10) that where a defendant intends to rely on (inter alia) any defence of illegality, or any statutory defence, he must file a notice stating that ground of defence, and (r. 18) that, when the defendant relies on any such defence, he shall in his statement indicate its nature. In the present case the defendants did not plead the Money-lenders Act, and therefore prima facie they were not entitled to set up any plea of the Act save by the express order of the Court permitting them on terms to file a notice.

The right and duty of the tribunal to take objection to the validity of the contract sued upon are, however, different from the right and duty of the defendant. It seems to me that in this connection contracts which are unenforceable are divisible into two classes—namely, those which are simply unenforceable, and those which are not only unenforceable but also illegal. In an action on a contract which is simply unenforceable, such, for example, as a contract coming within s. 4 of the Sale of Goods Act, 1893, if the defendant has not pleaded that the contract is unenforceable, there is no reason why the Court should take upon itself the duty of raising the defence which the defendant might have pleaded but did not plead. The case is wholly different, however, where the contract before the Court is not only unenforceable or void, but also illegal. Where the contract is on the face of it illegal on any ground, as for example because it involves a criminal charge or is against public policy, then, whether the defendant has pleaded its illegality or not, the Court is clearly entitled and indeed bound to take notice of the illegality and refuse to enforce the contract. Further, if, when the case is fully before the Court, the facts satisfy the Court that the contract is illegal, the Court is in like manner entitled and bound to refuse to consider it. A case of that kind was *Scott v. Brown, Doering, McNab & Co.* (1) in which the Court was asked to enforce an agreement to purchase shares in a company made

(1) [1892] 2 Q. B. 724, 728.

in order to create a fictitious market for the purchase of the shares. Wright J. who tried the case said in giving judgment that the parties to the agreement had been guilty of a fraud which could be brought home to them in a criminal court. Lindley L.J. in the Court of Appeal said: "No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him." A similar view was expressed by Lord Moulton in *North Western Salt Co. v. Electrolytic Alkali Co.* (1) He went on to point out that in cases where all the circumstances are not fully before the Court, it is not in general entitled to pronounce on the legality of the transaction; but even in reference to cases of that class he said: "One special case should perhaps be noticed. It is possible to conceive a case in which a fact comes to light in the course of the trial which of itself renders an agreement illegal on grounds which nothing could cure. In such a case the Court would act upon it."

As to money-lending contracts, a contract entered into by an unregistered money-lender is illegal. A person who conducts a money-lending business without being registered is carrying on a series of illegal acts. The true rule applicable in an action by an unregistered money-lender upon a contract entered into in the course of his business appears from the judgment of Cozens-Hardy M.R. in *In re Robinson's Settlement* (2), where he treats a transaction of that description as falling clearly within the principle of *Scott v. Brown, Doering, McNab & Co.* (3), citing with approbation the passage from the judgment of Lindley L.J. in that case, which I have already quoted. That the money-lending

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(1) [1914] A. C. 461, 475, 477.

(2) [1912] 1 Ch. 717, 725.

(3) [1892] 2 Q. B. 724.

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transaction which was in question in *In re Robinson's Settlement* (1) was considered an illegal transaction appears from the observation of Moulton L.J.: "So far as concerns the illegality of the transaction the matter is too clear to require a word from me." (2) In the early part of my own judgment in *Edgelow v. MacElwee* (3) I said: "The Money-lenders Act, 1900, precludes an unregistered money-lender from enforcing any contract made in the course of his money-lending business."

Hence, if it clearly appeared that the plaintiff in the present case was suing as an unregistered money-lender it would have been not only the right, but the duty of the Court to refuse to enforce the transaction. So far, however, was that from appearing that the contrary appeared. The witness who was called for the plaintiff did not say that she was an unregistered money-lender, but that she was a registered money-lender, and his evidence was not challenged by the defendants. This case instead of being a *prima facie* case of illegality was a *prima facie* case of legality. The business of money-lending is legal at common law, and it is also legal under the Act if the money-lender be registered. In this case the county court judge was not entitled to require the plaintiff to produce a certificate of registration, and I am unable to adopt the position which he took up.

During the argument before us a question arose as to the mode of proving the registration of a money-lender. Sect. 2 of the Act of 1900 requires that a money-lender shall be registered. Sect. 3 provides that the Commissioners of Inland Revenue may make regulations respecting the registration of money-lenders. Regulations have been made under that section and are set out in Chitty's Statutes, 6th ed., vol. ix., p. 87. It appears from these that: "The offices for registration shall be . . . For England and Wales—The office of the controller of stamps and stores, Somerset House, London, W.C." The result of that provision is to constitute a public registry for money-lenders at the office of that controller.

(1) [1912] 1 Ch. 717.

(2) *Ibid.* 726.

(3) [1918] 1 K. B. 205.

The Act of 1900 contains no particulars as to the proof of the registration.

Any defect of the Act in that respect is, however, supplied by s. 14 of the Evidence Act, 1851, which provides that whenever any document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders it provable by means of a copy, any copy thereof shall be admissible in evidence provided it be proved to be an examined copy, or provided its purport to be signed and certified as a true copy by the officer to whose custody the original is entrusted. In my view that section applies here. The registry kept at the office of the controller of stamps is a public registry, and proof of registration may be given in any of the ways mentioned in that section.

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Appeal allowed. Judgment for plaintiff.

Solicitor for plaintiff, appellant : *H. J. Speechley, for Carter, James & Lowe, Nottingham.*

Solicitors for defendants, respondents : *Henry Hilbery & Son.*

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[IN THE COURT OF APPEAL.]

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[KINGSTON-UPON-HULL DISTRICT REGISTRY.]

Practice—Action of Slander—Judgment in Default of Appearance—Writ of Inquiry as to Damages—Writ issued without Summons for Leave—Irregularity—Waiver—Juries Act, 1918 (8 & 9 Geo. 5, c. 23), s. 2—Rules of the Supreme Court (Juries Act), 1918, r. 6A.

By s. 2 of the Juries Act, 1918, a writ of inquiry to assess damages on a judgment in default of appearance or defence shall not issue without the leave of the Court or a judge, provided that where the claim is in respect of (inter alia) slander, either party shall, on application in accordance with rules of Court, be entitled to insist on the issue of a writ of inquiry. By r. 6A of the Rules of the Supreme Court (Juries Act), 1918, "the application shall be made" by a summons.

In an action of slander the defendant did not enter an appearance, and the plaintiff signed interlocutory judgment for damages to be assessed. The plaintiff thereupon, without taking out a summons for leave to issue a writ of inquiry, lodged a præcipe and a writ of inquiry was issued by a clerk in the district registry office directed to the sheriff to assess the damages with a jury. The defendant, after he became aware that the writ of inquiry was issued without a summons having been taken out, took certain steps in the action, as for instance by applying for particulars of the claim, and by attending at the inquiry and objecting to the jurisdiction of the Court; and when the under-sheriff overruled the objection, by taking part in the hearing. The jury assessed the damages at 5*l.*, and judgment was entered for the plaintiff for that amount. The defendant gave notice of appeal to the Court of Appeal, asking that the verdict given and judgment directed on the trial before the under-sheriff and a jury be set aside and a new trial had or judgment entered for the defendant, upon the ground that the writ of inquiry was issued without the leave of the Court or a judge, and that the under-sheriff had no jurisdiction to hold the inquiry, and the proceedings before him were null and void :—

Held, by Bankes and Younger L.JJ., Atkin L.J. dissenting, that the appeal should be dismissed.

By Bankes L.J. : The Court should not in the circumstances exercise any jurisdiction it had under Order XXXIX. over the verdict and judgment by setting them aside, the defendant's real application being, not for a new trial or judgment, to which the application to set aside the verdict and judgment was merely incidental, but to have the writ of inquiry set aside, which could only be done by an application for that purpose in the King's Bench Division. Though therefore it was not necessary to decide it, in his opinion the omission to take out a summons

was a mere irregularity within Order LXX. which was capable of being and had been waived by the defendant.

By Younger L.J.: The appeal did not come within the new trial jurisdiction of the Court of Appeal under the Judicature Act, 1890, s. 1, and Order xxxix., r. 1, as the defendant's real application was to set aside the writ of inquiry and all the proceedings thereunder as null and void; the proper procedure for that purpose was by an application to the King's Bench Division from which the writ had issued; and, even if it were competent for the Court to entertain the appeal, the omission to take out a summons for leave to issue the writ of inquiry, on which no other order would have been possible than that the writ should issue, was a mere irregularity within Order LXX. which had been waived.

By Atkin L.J.: Sect. 2 of the Juries Act, 1918, enacted a direct prohibition against the issue of a writ of inquiry without the leave of the Court or a judge, and the writ, having been issued in violation of the statutory prohibition, was wholly inoperative, and all the proceedings thereunder were null and void, and the want of jurisdiction could not be waived; and it was irrelevant that if an application had been made for leave the plaintiff would have been entitled as of right to the writ. The defect was apparent on the face of the proceedings in the absence of an order authorizing the issue of the writ. Though the Court of Appeal had no power on the appeal to set aside the writ of inquiry, it had power under Order xxxix., r. 1, to set aside the verdict and judgment, and the defendant was entitled to have them set aside.

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APPEAL of the defendant from the verdict and judgment before the under-sheriff and a jury.

The action was to recover damages for slander. The writ was issued on April 7, 1920. The defendant did not enter an appearance to the writ, and on April 16 the plaintiff signed interlocutory judgment for damages to be assessed. A præcipe for a writ of inquiry was handed in, and on April 27 a writ of inquiry was issued directed to the sheriff of the county of York, commanding him "by the oaths of twelve good and lawful men of your bailiwick" to inquire what damages the plaintiff was entitled to recover under the judgment. The plaintiff did not take out a summons under s. 2 of the Juries Act, 1918, and Order xxxvi., r. 6A (3.), before the district registrar for an order that the damages should be assessed by a jury (1); but the writ of inquiry was

(1) Juries Act, 1918, s. 2: "Notwithstanding any provision in any rules of Court directing that on a judgment in default of appearance or defence a writ of inquiry shall issue to assess the damages or value of goods and damages, or either of them, or any mesne profits, arrears

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issued by a subordinate official in the office of the district registry. On April 30 notice of trial under the writ of inquiry before the sheriff of the county of York and a jury at the Town Hall, Leeds, on May 11 was duly served on the defendant. On May 6 the defendant took out a summons before the district registrar for an order that the plaintiff should deliver a statement of claim or file particulars of his claim before any assessment of damages took place, and on May 7 an order was made upon the summons that the plaintiff should within twenty-four hours file particulars of his claim in the action. On May 7 a summons was taken out by the defendant before the district registrar for an order that the writ of inquiry issued on April 27 "be set aside on the ground that no direction was obtained from the practice master or district registrar with regard to the place of trial." This summons was heard on May 11, and "no order" was made upon it. Meanwhile on May 8 the plaintiff delivered particulars of his claim.

of rent, double value or damages, such a writ shall not issue without the leave of the Court or a judge, and, where such leave is not given, the damages, value, mesne profits or arrears shall be assessed by a master or a district registrar, or in such other manner as the Court or a judge may direct:

"Provided that where the claim is in respect of fraud, slander, malicious prosecution, false imprisonment, seduction, or breach of promise of marriage, either party shall, on application made in accordance with rules of Court, be entitled to insist on the issue of a writ of inquiry."

By the Rules of the Supreme Court (Juries Act), 1918, so long as the Juries Act, 1918, has effect, r. 6 of Order xxxvi. shall cease to have effect, and r. 6A is substituted for it, Rule 6A, sub-clause 1: "In every action, including any action in which an order for trial with a jury has

been made before 12th October, 1918, in which any party desires a trial with a jury, an application for such trial shall be made under the Juries Act, 1918."

Sub-clause 2 dealt with cases where the action was in the list of cases for trial during the week commencing October 13, 1918, and with cases where the action was entered for trial at any assize town the commission day for which fell within the said week.

Sub-clause 3: "In all actions other than those mentioned in sub-clause (2.) of this rule, the application shall be made on the summons for directions or a notice thereunder or on an application under Order xiv. or by a summons."

Sub-clause 6: "Action in these rules includes any action, counter-claim, cause, or matter or any question or issue therein, or any proceeding for divorce or other matrimonial cause."

The inquiry as to damages was held before the under-sheriff and a jury on May 11, when the defendant was represented by counsel, who took objection to the jurisdiction of the Court on the ground that no order had been obtained for trial with a jury. The under-sheriff overruled the objection. The defendant's counsel then took part in the inquiry, cross-examined the witnesses, and addressed the jury. The jury assessed the damages at 5*l.*, and on May 13 judgment was entered for the plaintiff for that amount with costs to be taxed.

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On June 22 the defendant gave notice of appeal to the Court of Appeal asking (omitting formal parts) "that the verdict given and judgment directed on the trial of this action before the under-sheriff of the county of York and a common jury at Leeds on the 11th day of May, 1920, be set aside and a new trial be had between the parties and the costs of the former trial be paid by the plaintiff, or alternatively that judgment be entered in the action for the defendant with costs of the action, and for an order that the plaintiff pay to the defendant the costs of and occasioned by this application.

"And further take notice that the grounds of this application are:—(1.) That the said under-sheriff was wrong in law in holding that the writ of inquiry in this action issued on the 27th day of April, 1920, was properly issued according to law; (2.) that the said writ of inquiry was issued without lawful authority; (3.) that the said writ of inquiry was issued without the leave of the Court or a judge having been obtained; (4.) that the said under-sheriff was wrong in law in holding that he had jurisdiction to hold the inquiry directed by the said writ; (5.) that the said under-sheriff had no jurisdiction to hold the said inquiry; (6.) that the whole of the proceedings before the said under-sheriff were null and void."

W. R. Briggs for the defendant. Under s. 2 of the Juries Act, 1918, a writ of inquiry to assess damages on a judgment in default of appearance "shall not issue without the leave

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of the Court or a judge," provided that in the case of a claim in respect of (inter alia) slander either party shall, "on application made in accordance with rules of Court, be entitled to insist on the issue of a writ of inquiry." Rule 6A, sub-clause 3, of Order XXXVI. provides that "in all actions" "the application shall be made by a summons." By sub-clause 6 of that rule "action" includes "any action, counter-claim, cause, or matter or any question or issue therein," and therefore includes a writ of inquiry. There is a direct prohibition against the issue of a writ of inquiry except upon summons, that is, by an order of the judicial authority, a master (or district registrar) or judge in chambers. The plaintiff did not obtain an order for a writ of inquiry on a summons before the district registrar; the writ was issued by a clerk in the district registry office without any order of the district registrar. The writ and all the proceedings thereon are therefore a nullity, and this Court will set them aside: *Hamp-Adams v. Hall*. (1) As Vaughan Williams L.J. in that case said (2): "It was impossible for the defendant to waive the defect, for the result of the non-compliance with the rule" (Order IX., r. 15) "was that there was no writ on which the plaintiff was entitled to proceed." And later (3): "Where proceedings are taken by a plaintiff in the absence of the defendant it is most important that there should be at every stage a strict compliance with the rules, and therefore it is a reasonable and proper thing in the case of proceedings by default to treat non-compliance with such a rule as Order IX., r. 15, not as a mere irregularity which can be waived, but as a matter which prevents any further proceedings from being taken on the writ." Those observations exactly apply to this case. The writ and all subsequent proceedings thereon are, not merely irregular, but null and void, and this Court will set them aside upon an application under Order XXXIX. *Fry v. Moore* (4) is distinguishable, because the writ was regularly issued, the order for substituted service being a bad order, which was capable of being and was waived as

(1) [1911] 2 K. B. 942.

(2) Ibid. 943.

(3) Ibid. 944.

(4) (1889) 23 Q. B. D. 395.

a mere irregularity. In the present case the whole foundation of the under-sheriff's jurisdiction depends on the validity of the writ of inquiry, which was a bad writ. The fact that by s. 2 of the Juries Act, 1918, the action being for slander, the plaintiff would have been entitled to the writ on an application by summons does not affect the question, because he would only be so entitled "on application made in accordance with rules of Court"—namely, by Order xxxvi., r. 6A (3.), "by a summons."

J. B. Matthews K.C. and *J. R. Macdonald (Picciotto with them)* for the plaintiff. This is in reality an application to set aside the writ of inquiry, and does not come within the new trial jurisdiction of this Court under Order xxxix., rr. 1, 2, 3. The application to set aside the judgment is merely incidental to the application for a new trial or judgment. The application to set aside the writ of inquiry and all proceedings thereunder ought to have been made to the King's Bench Division, whose officer irregularly issued the writ of inquiry, that is, to a master or judge in chambers. This was the procedure adopted in *Hamp-Adams v. Hall*. (1) No complaint is made of the verdict or judgment if the writ of inquiry had been regularly issued. The sheriff or his deputy is merely an executive officer bound to obey the writ of inquiry, and could not go behind it. The process of setting aside a writ of execution irregularly issued is analogous; the application is to a master in chambers: Chitty's Archbold's Practice, 14th ed., p. 830.

Further, the omission to take out a summons under s. 2 of the Juries Act, 1918, and Order xxxvi., r. 6A (3.), was a mere non-compliance with a rule of practice within Order lxx., r. 1, and was therefore an irregularity within r. 2 which was waived by steps being taken by the defendant after knowledge of the irregularity. The plaintiff was, by the proviso in s. 2 of the Juries Act, 1918, entitled to a writ of inquiry, the only irregularity being that he omitted to take out a summons for that purpose under Order xxxvi., r. 6A (3.). It is the purest technicality. Lord Brougham in *Auchterarder*

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Presbytery v. Earl Kinnoull (1) said : " In other words, a form had been omitted which ought to have been observed, but the omission was immaterial." The rules of Court are statutory; therefore non-compliance with a rule or with a statute comes within Order LXX., rr. 1, 2. Hence, even if this were the breach of a statutory requirement, Order LXX. would apply. But it is merely a breach of Order XXXVI., r. 6A (3.), and is an irregularity. The defendant waived the irregularity by asking for particulars of the plaintiff's claim, by taking out a summons to set aside the writ of inquiry, though on a wrong ground, and by taking part in the inquiry before the under-sheriff though he took objection to the jurisdiction of the under-sheriff. These were all steps taken by the defendant after knowledge of the irregularity, and each of them was an act of waiver of the irregularity within Order LXX., r. 2 : *Fraas v. Paravicini* (2); *Doe v. Jepson* (3) (a breach of a statutory requirement); *Yonge v. Fisher*. (4)

Briggs in reply. The Court of Appeal has jurisdiction to entertain this application under s. 1 of the Judicature Act, 1890 (53 & 54 Vict. c. 44). The steps necessary for suing out a writ of inquiry before the Juries Act, 1918, are set out in Chitty's Archbold's Practice, 14th ed., p. 1332. The Juries Act, 1918, prescribes a condition precedent to the issue of the writ, which statutory requirement cannot be waived : see *Smith v. Baker*. (5) The writ of inquiry is a judicial writ, and is not analogous to a writ of execution. Order LXX., r. 1, is confined to " non-compliance with any of these rules or with any rule of practice," and does not include a statutory requirement.

Cur. adv. vult.

Dec. 20. BANKES L.J. read the following judgment : This is an appeal by the defendant in an action for slander. No appearance was entered to the writ, and interlocutory judgment was signed for default of appearance on April 16,

(1) (1839) 6 Cl. & F. 646, 708.

(3) (1832) 3 B. & Ad. 402.

(2) (1812) 4 Taunt. 545.

(4) (1842) 4 Man & G. 814.

(5) (1864) 2 H. & M. 498.

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An application for a new trial where damages have been assessed upon a writ of inquiry before a sheriff and a jury is properly made to this Court: *Radam's Microbe Killer Co. v. Leather*. (1) Upon the hearing of such an application this Court has all such powers as are exercisable by it upon the hearing of an appeal: Order xxxix., r. 2. I have no doubt that it is within the power of this Court to do part of what the appellant asks for in his notice of appeal. Whether the Court should exercise that power is a very different question. It is obvious that there is not a shred of merits in this appeal. The appellant

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(1) [1892] 1 Q. B. 85.

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is entitled to his full rights, but not to any indulgence. It would, in my opinion, be an indulgence which ought not to be granted to him if the appellant was allowed any portion of what he asks for in his notice of appeal. The notice of appeal is in the ordinary form of a notice asking for a new trial, or in the alternative for judgment. The substance of the application is the request for a new trial or for judgment. It is incidental only to that relief that the request is added that the verdict and judgment may be set aside. The appellant does not really desire either a new trial or judgment. What he really wants is to set aside the writ of inquiry on the ground that no order for a jury was obtained as is now required by the Juries Act, 1918, and Order XXXVI., r. 6A. Under another form and on different grounds the application is really to get indirectly the relief which the appellant failed to get directly when he applied to the district registrar on May 7 to set aside the writ of inquiry. Under the circumstances of this case the Court should, I consider, hold the appellant strictly to his notice of appeal, and as he cannot have either a new trial or judgment the appeal should be dismissed with costs. I am confirmed in this view by a consideration of the situation which would be created if we acceded to the suggestion of the appellant's counsel and set aside the verdict and judgment. The writ of inquiry would still stand as an unexecuted writ, which the King's Bench Division has refused to set aside. In my opinion the Court ought not to lend its aid to the creation of such an unsatisfactory position unless compelled to do so. The appellant's proper course is to seek his remedy in the King's Bench Division, and the present is not a case in which this Court should, in my opinion, by way of indulgence exercise any jurisdiction which it may have over the verdict and judgment obtained by the plaintiff.

This view of the case renders it unnecessary to express any opinion upon the extremely difficult question whether the omission to apply by summons for a jury is an irregularity capable of being dealt with under Order LXX., r. 2, or whether the omission deprives the sheriff of any jurisdiction to hold the

inquiry. The distinction between a nullity and an irregularity has been the subject of discussion from early times. Any of the early editions of the books on practice disclose the extent of the discussion, and the different views taken by judges on the subject. Sometimes an omission to follow the positive direction of a rule of practice has been treated as immaterial on the ground that the rule was directory only: *Millar v. Bowden* (1); sometimes such an omission has been treated as an irregularity capable of being waived: *Gurney v. Hopkinson* (2); *Ryley v. Boissomas* (3); sometimes where the omission was in the failure to comply with a statutory provision as a nullity: *Garratt v. Hooper*. (4) In *Rex v. Tristram* (5) the Master of the Rolls, in dealing with the omission to comply with a statutory requirement, takes the same view as was taken by the Court in *Garratt v. Hooper*. (4) He said: "It is a condition precedent to the right of the grantee to give judgment, and unless he fulfils the condition he exceeds his jurisdiction in pronouncing judgment." The strictness of this view has not been observed in quite a number of cases if the rules of Court are to be regarded as having the force of a statute which, by s. 16 of the Judicature Act, 1875, and the similar sections of later Acts, they presumably have. The cases I refer to are mostly of the kind where by leave the Court has jurisdiction, but without leave no jurisdiction. In all these cases the failure to obtain the necessary leave has been considered an irregularity merely, capable of being waived. In *Fry v. Moore* (6) the omission was in not having obtained leave to serve a writ out of the jurisdiction. In *Petty v. Daniel* (7) the omission was in not having served a copy of the affidavit in support with a notice of motion to commit. In *Moore v. Gamgee* (8) the statutory requirement of obtaining leave to commence an action in a Court other than that in which the defendant dwelt or carried on business had not been complied with: see also

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(1) (1831) 1 Cr. & J. 563.

(2) (1834) 3 Dowl. 189.

(3) (1832) 1 Dowl. 383.

(4) (1831) 1 Dowl. 28.

(5) [1902] 1 K. B. 816, 828.

(6) 23 Q. B. D. 395.

(7) (1886) 34 Ch. D. 172.

(8) (1890) 25 Q. B. D. 244.

C. A. *Clarke v. Knowles*. (1) *Moore v. Gamgee* (2) is referred to in 1920 *Alderson v. Palliser* (3), and commented on but not overruled, though it would seem that the Court of Appeal in that case took an entirely different view from the one expressed by Cave J. In *Lloyd v. Great Western Dairies Co.* (4) the Court of Appeal, consisting of Vaughan Williams, Fletcher Moulton, and Buckley L.JJ., appear to me to have considered the omission to obtain leave to join another cause of action with an action for the recovery of land as a matter which could be waived.

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It is extremely difficult to define the distinction between an irregularity and a nullity. In Chitty's Archbold's Practice, 14th ed., p. 445, it is said: "Where the proceeding adopted is that prescribed by the practice of the Court, and the error is merely in the manner of taking it, such an error is an irregularity, and may be waived by the laches or subsequent acts of the opposite party; but where the proceeding itself is altogether unwarranted, and different from that which, if any, ought to have been taken, then the proceeding in general is a nullity, and cannot be waived by any act of the party against whom it has been taken." It seems to me only possible to reconcile *Hamp-Adams v. Hall* (5), when the Court consisted of Vaughan Williams and Buckley L.JJ., with *Lloyd v. Great Western Dairies Co.* (4) on some such principle as the above. In the present case the appellant's solicitor was aware on May 7 that no leave had been obtained for a jury. Under these circumstances the appellant must, I consider, be taken to have waived any irregularity in the proceedings if what had occurred was an irregularity capable of being waived. The Juries Act, 1918, is no doubt a statute introduced for the benefit of the public, a provision of which according to the general rule could not be waived; see Vaughan Williams L.J. in *Norwich Corporation v. Norwich Tramways Co.* (6) This statute contains the special provision in the proviso that in case of an action for slander

(1) [1918] 1 K. B. 128.

(2) (1890) 25 Q. B. D. 244.

(3) [1901] 2 K. B. 833.

(4) [1907] 2 K. B. 727.

(5) [1911] 2 K. B. 942.

(6) [1906] 2 K. B. 119, 126.

the order, if applied for, must be made. Under these circumstances the statute so far as it relates to actions within the proviso can hardly be considered as a statute for the benefit of the public. The statute itself places the duty of prescribing how the necessary leave is to be obtained upon the Rule Committee. They have introduced Order XXXVI., r. 6A, which requires the necessary leave to be obtained by summons. The omission therefore in the present case, and the only omission, is the failure to take out the summons, because had the summons been taken out the order must have been made.

The position of this Court in dealing with the present application is not quite the same as that of a Court of the King's Bench Division dealing with an application for a prohibition, as was the case in *Farquharson v. Morgan*. (1) We have no jurisdiction to deal directly with the writ of inquiry or with any further proceeding upon it. The question is one of very considerable difficulty, but I consider that, under the very special circumstances of this case, this Court, if it was necessary to give a decision on the point, should and can consistently with the decisions in this Court say that the omission to take out the summons was an irregularity which is capable of being and has been waived.

ATKIN L.J. read the following judgment: The defendant asks to have the verdict of the jury at the inquiry before the sheriff set aside on the ground that there was no jurisdiction to hold the inquiry. The first question is whether the sheriff had jurisdiction. I am clearly of opinion that he had not. Interlocutory judgment has been duly signed against the defendant for default of appearance. Before the Juries Act, 1918, the plaintiff would have been entitled as of course to have a writ of inquiry sealed directing the sheriff to summon a jury and inquire as to the amount of the damages. The writ would have been sealed on a *præcipe* handed in by the plaintiff, and no leave was required. Sect. 2 of the Juries Act, 1918, enacts a direct prohibition against issuing such

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a writ without leave, and therefore interposes the necessity for an order by the Court or a judge before the writ of inquiry can be granted. The proviso to the section preserves the plaintiff's right to such a jury if he applies for it in accordance with the prescribed procedure. The application is, in my opinion, to be an application for leave and is to be made by summons, and is to be made to the only authority to whom a summons could be addressed, the Court or a judge. It appears to me to be quite irrelevant that on this application, as on so many other applications in chambers, the applicant is entitled as of right to the order asked for. The Legislature might have preserved the old practice ; but as they have not, there must be a determination by a judicial authority before the writ can be issued. It is admitted that no application was made and no leave to issue the writ of inquiry was ever granted by the Court or a judge. The result seems to me to be that the writ in this case was issued in violation of a statutory prohibition ; the issue was illegal and the writ is wholly inoperative. An inquiry held by a sheriff and a jury is one of the few remaining instances of a proceeding in the sheriff's county court (see Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 18), a court of great antiquity. Whatever the general jurisdiction of this court was in former days, it has now been superseded by the county court, and in respect of an assessment of damages the jurisdiction always arose, as it does now, from an order founded on a judgment of the King's Court and given in a suit between particular parties. In other words, in the matter of assessment of damages the sheriff had no general jurisdiction, however restricted ; his authority is given him by a special order in each case, and by the recent statute can only be given by judicial determination of the Court or a judge. In the absence of such a judicial order the sheriff and a jury have no more power to determine the question of damages than a coroner and a jury, or a recorder and a jury. The proceedings are coram non iudice and, in my opinion, are wholly ineffective and void.

It is said that the defect was waived by the defendant. If the lack of jurisdiction could be waived I think that the

question of waiver would require careful consideration, for there is some evidence that with knowledge of the defect the defendant applied for further particulars of the claim; and I should have desired to consider how far such an application, not made before the sheriff's tribunal itself, would amount to a waiver. But in my opinion the defect could not be waived. The distinction between a defect which causes the proceedings to be null and void and a defect which is merely an irregularity is well established; an irregularity can be waived; a nullity cannot. I have already stated my reasons for holding that in this case the proceedings were a nullity.

There are two or three authorities to which I desire to refer. In *Farquharson v. Morgan* (1) a claim for compensation by an outgoing tenant had been referred to arbitration under the provisions of the Agricultural Holdings Act, 1883. An award was made which dealt with matters outside the Agricultural Holdings Act. The landlord appealed against the award to the county court judge and subsequently to the Divisional Court; and before the Divisional Court consented to the matter being remitted to the county court judge, and undertook to make no objection to another umpire being appointed. The county court judge affirmed the award, and later made an order under s. 24 of the Act enforcing the award. The landlord then applied for a prohibition on the ground that there was no jurisdiction to enforce such an award. The Court of Appeal, reversing the Divisional Court, held that notwithstanding the repeated acts of waiver he was entitled to succeed. The ultimate decision turned upon the defect being patent, i.e., apparent on the face of the proceedings, as to which I will say something later, but some passages in the judgment are instructive. Lord Halsbury said (2): "It has been long settled that, where an objection to the jurisdiction of an inferior Court appears on the face of the proceedings, it is immaterial by what means and by whom the Court is informed of such objection. The Court must protect the prerogative of the Crown

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(1) [1894] 1 Q. B. 552.

(2) Ibid. 556.

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and the due course of the administration of justice by prohibiting the inferior Court from proceeding in matters as to which it is apparent that it has no jurisdiction. The objection to the jurisdiction does not in such a case depend on some matter of fact as to which the inferior Court may have been deceived or misled, or which it may have unconsciously neglected to observe, and the judge of such Court, therefore, must or ought to have known that he was acting beyond his jurisdiction. I find no authority justifying the withholding of a writ of prohibition in such a case." Davey L.J. said (1): "The other principle is correlative to the first; it is that the parties cannot by agreement confer upon any Court or judge a coercive jurisdiction which the Court or judge does not by law possess. To do so would be an usurpation of the prerogative of the Crown, and it has always been the policy of our law as a question of public order to keep inferior Courts strictly within their proper sphere of jurisdiction: see the judgment of the Common Pleas in *Worthington v. Jeffries*. (2) It follows that a party may, notwithstanding that he has contracted to have the dispute decided, or a decision in the matter enforced, by a Court not possessing by law jurisdiction, refuse to be bound by his contract and object to the jurisdiction, subject to the provisions embodied in the Arbitration Act, 1889, so far as applicable. It also follows that jurisdiction cannot be given by acquiescence. These principles are so well known that they need no illustration from decided cases or other authority." In *Alderson v. Palliser* (3) an affidavit in support of an application for leave to issue a judgment summons out of the district of the county court was defective for not being in accordance with the form prescribed by the rules. Leave was given to the defendant at the hearing of the summons to file an affidavit of merits. The judge made a committal order; but on an application for prohibition the Court of Appeal, reversing the Divisional Court, held that the defect could not be waived where the defect appeared on the face of the proceedings as

(1) [1894] 1 Q. B. 560.

(2) (1875) L. R. 10 C. P. 379.

(3) [1901] 2 K. B. 833.

in that Court. Stirling L.J., referring to the two principles stated by Davey L.J. in *Farquharson v. Morgan* (1), said (2): "One is that parties cannot by contract oust the jurisdiction of the Courts; but the learned Lord Justice pointed out how that had been modified. The other principle he declared to be correlative of the first, namely, that 'the parties cannot by agreement confer upon any Court or judge a coercive jurisdiction which the Court or judge does not by law possess.' Waiver is merely a form of agreement or consent to a particular course of action; and if the county court judge had no jurisdiction in the present case, the parties could not confer it upon him by consent." In *Hamp-Adams v. Hall* (3) the plaintiff had issued a writ of summons against the defendant, served it pursuant to an order for substituted service, and signed judgment on default of appearance. He obtained a writ of inquiry, and in the defendant's absence the jury returned a verdict for the plaintiff. On an application to set aside all the proceedings the Court of Appeal, reversing the judge in chambers, held that the defendant was entitled to an order upon the ground that the service of the writ of summons was defective because the person who served it had not indorsed thereon the date of service within three days after service, though he had made the indorsement six days after. It was held that it was impossible for the defendant to waive the defect, for the result of non-compliance with the rule was that there was no writ on which the plaintiff was entitled to proceed. Vaughan Williams L.J. said (4): "It is contended for the plaintiff that the non-compliance with the rule has been waived by the defendant. In my opinion it was impossible for the defendant to waive the defect, for the result of the non-compliance with the rule was that there was no writ on which the plaintiff was entitled to proceed. Then it was said that at the most the case should be regarded as one in which there has been a mere irregularity, and Order LXX., r. 2, was called to our attention as showing how the right of a party to take

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(1) [1894] 1 Q. B. 560.

(3) [1911] 2 K. B. 942.

(2) [1901] 2 K. B. 838.

(4) Ibid. 943.

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advantage of a defect in the nature of an irregularity may be limited or taken away. In my opinion that rule has no application to the circumstances of the present case. It is said that it is a very severe penalty to put on a mistake of this kind that all the subsequent proceedings should be set aside. I am not at all impressed by that argument. Where proceedings are taken by a plaintiff in the absence of the defendant it is most important that there should be at every stage a strict compliance with the rules, and therefore it is a reasonable and proper thing in the case of proceedings by default to treat non-compliance with such a rule as Order ix., r. 15, not as a mere irregularity which can be waived, but as a matter which prevents any further proceedings from being taken on the writ." Buckley L.J. said (1): "Where a plaintiff proceeds by default every step in the proceedings must strictly comply with the rules; that is a matter strictissimi juris. That has not been done in this case, and on these grounds I am of opinion that this judgment must be set aside." It is to be noticed that so far as the sheriff was concerned the proceedings were apparently regular, though in the proceedings as a whole the defect was apparent in the indorsement on the writ. In the same way in the present case there is an obvious defect in the proceedings in the action in the absence of an order authorizing the issue of the writ. But in any case, even if the defect had to be apparent on the face of the proceedings in the sheriff's court, where a Court exercising special jurisdiction is informed at the commencement of the proceedings that there is an initial defect which is not controverted by the other side, it appears to me that the Court is necessarily in the same position as though the defect were apparent on the face of the proceedings.

The further point was taken that, however void the proceedings, the plaintiff's remedy is not by appeal, but by application to set aside the writ of inquiry. In my opinion this objection is ill-founded. The terms of Order xxxix., r. 1, are wide enough to cover the present application, and have been held by the Court of Appeal to apply to an application

(1) [1911] 2 K. B. 945.

for a new trial of an inquiry before a sheriff and a jury under a writ of inquiry. The proceedings in question have resulted in a verdict upon which a return has been made by the sheriff, and judgment has been signed by the plaintiff. If the sheriff or his deputy had misdirected the jury, this Court must be admitted to have power to set aside the verdict, return, and judgment. In my opinion they cannot have less power because the jury ought not to have returned any verdict at all. If the Court have power to entertain the appeal, it appears to me immaterial that the defendant could obtain relief by some different proceeding. An application to this Court is not like an application to the King's Bench Division for the exercise of its authority by the issue of a prerogative writ in circumstances where the applicant must show the absence of any other adequate remedy. If we have jurisdiction and the appellant establishes his case, he is entitled *ex debito justitiæ* to his remedy. An analogy is to be found in appeals from the county court under s. 120 of the County Courts Act, 1888. The Divisional Court will entertain an appeal on the ground of lack of jurisdiction in the county court notwithstanding the concurrent remedy by prohibition: *Barker v. Palmer* (1); *Sweetland v. Turkish Cigarette Co.* (2)

Nor do I see any reason for supposing that our jurisdiction is limited to cases where the ultimate order made is one for a new trial or judgment. The defendant claims that the verdict of a jury assessing damages against him is invalid, and asks to have it set aside. I know no tribunal except this Court that can set aside the verdict of a jury in proceedings in the High Court or before a sheriff; and this Court is given express power by Order xxxix., r. 1. If there had been an order in an action to stay proceedings, and nevertheless the parties or one of them in the absence of the other went on to verdict or judgment, could there be any doubt of the power of this Court to set aside the verdict or judgment? And yet there would be no order for a new trial or judgment. That the appellant has asked for further relief than he is entitled to

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(1) (1881) 8 Q. B. D. 9.

(2) (1899) 47 W. R. 511.

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should be considered a ground for depriving him of the relief which it is within the jurisdiction of the Court to grant him and to which he is entitled, or that this Court has any discretion to refuse to award legal rights duly established before it, is a doctrine to which I respectfully am unable to subscribe.

It is true, I think, that we cannot on this appeal set aside the writ of inquiry. But that writ is according to my judgment of no effect; and if the subsequent proceedings are in consequence also ineffective, I think that the defendant is entitled to have them set aside.

YOUNGER L.J. read the following judgment: It is objected to this appeal that it is misconceived both as to forum and in substance. As to forum it is said that it has been brought to the wrong Court; as to substance it is said that it concerns a complaint which at its highest amounts to a mere irregularity ineffective to alter even in a detail the necessary result of prescribed regular procedure. I am of opinion that these objections to the appeal are both of them well founded. As to the objection that it has been brought to the wrong Court, the appellant's notice of appeal is framed on the footing that his application is for judgment or a new trial on motion made to this Court pursuant to Order XXXIX. It appears, however, that his desire, and in the circumstances his really effective relief, if he be entitled to any relief, is to have the writ of inquiry directed to the sheriff and all subsequent proceedings thereon declared inoperative for every purpose. That this is so is made plain by the terms of the appellant's notice of appeal. By that notice he asks that the verdict of the sheriff's jury be set aside and a new trial had, or alternatively that judgment be entered in the action for the defendant. But when he goes on pursuant to Order XXXIX., r. 3, to state the grounds of his application it becomes apparent that, while they would be most appropriate and relevant as objections on an application to the Court or a judge under Order LXX., rr. 1 and 3, to set aside the proceedings before the under-sheriff altogether, they have nothing

to do either with the conduct of the inquiry or the verdict of the jury, that is, with those matters with which an application to this Court under Order xxxix. is at least primarily concerned. They deal entirely with the invalidity of the writ of inquiry, a writ which the under-sheriff merely obeyed, as I conceive he was bound to do, the appellant's real and only complaint being that the writ had issued without lawful authority, that in consequence the sheriff had no jurisdiction to hold the inquiry at all, and that the whole proceedings before him were null and void.

In other words the appellant's sole effective complaint is with reference to the issue of the writ on which the jury's verdict and the judgment entered by the under-sheriff proceeded; of the propriety of that verdict and judgment as such, no criticism is made. What therefore the appellant seeks to do, if he can, is to get rid of the writ, and the question is whether that end of his can be attained either directly or indirectly by an application to this Court under Order xxxix. I think that it cannot.

The power of this Court to hear and determine a motion for a new trial, or to set aside a verdict, finding, or judgment, in any cause or matter in the High Court or any issue therein is conferred by the Judicature Act, 1890, s. 1, and is by the express terms of the section confined to the case "where there has been a trial thereof with a jury." These words are reproduced in Order xxxix., r. 1, and although there are few cases in which they are of any importance, the present case satisfies me that they are by no means superfluous or without significance, and they should have due effect given them. No more is done if it be held that there can be no new trial to be applied for within the meaning of the section unless there has already been some kind of trial, however irregular. But here all the proceedings before the under-sheriff were in the appellant's view *coram non judice*, entirely null and void. There has been no trial at all. That is the appellant's necessary allegation. But if so, there can be, as I think, no appeal to this Court under the section. On this point I notice that the learned editors of the Annual

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C. A. Practice, 1921, p. 679, express a doubt whether Order xxxix.
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v. the least however this view of the section and order only
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Younger L.J. —namely, that, if the appellant would get rid of this writ of inquiry of which he complains, any application for the purpose must in the first instance be made to the King's Bench Division from which the impugned writ is said wrongly to have issued. What has in fact happened here, if the appellant be right, is that process has issued out of that Division without the authority of its proper judicial officer. It has been issued by the unauthorized act of a non-judicial official. Over him, as over all its officers, the Division has full authority; this Court has none: and accordingly it would seem that necessarily it is to that^o Division that a person aggrieved by any such unauthorized act must apply for redress. Only if redress be wrongly refused when such application is made can recourse be had to this Court. For this Court to interfere before any such application has been made and refused, would be, I conceive, in the legal sense, an impertinence.

It follows that in my judgment the proper procedure for the appellant to have taken in this case was that adopted under precisely analogous circumstances in *Hamp-Adams v. Hall*. (1) Moreover that was in my judgment his only proper procedure. Here he did adopt it when, although on wrong grounds, he took out before the district registrar his summons of May 7, 1920. What he ought to have done when that summons was dismissed was to appeal to the judge in chambers. This he did not do. The consequence is that the unauthorized act of which he now complains has never been brought to the notice of a judge of the King's Bench Division at all, and we are not, as I think, entitled to take original cognizance of his complaint. This will suffice to dispose of the appeal, but the same result follows an approach to the question from another angle.

(1) [1911] 2 K. B. 942.

It is manifest that, even if every ground for his appeal be justified, the appellant would not be entitled to the relief which by his notice he claims from this Court. First of all his application to have judgment entered for him in the action is quite hopeless. Such relief can in no way result from his present complaint, however well-founded it be. Next I am satisfied that his application that the verdict and judgment be set aside and a new trial directed ought not to be acceded to whether that relief is, as I think it is, one and indivisible, or whether it is severable. If it be indivisible it is plain that this Court cannot direct a *new* trial when the appellant's complaint, if it means anything, means that there is no existing order of any competent Court or judge for any trial, and when it is not to this Court that is entrusted the original power of making such an order. If, however, the relief claimed on this head be severable, then it seems to me that this Court ought not to entertain the application to set aside the verdict and judgment for the reason that in relation to neither is there any matter of which the appellant really complains.

The result is that in my judgment the appellant's application ought not to be entertained by this Court. His appeal to us, however it be regarded, is, I think, either misconceived or inadmissible.

But even if it were competent for this Court to entertain that appeal, it ought, I think, to fail on its merits, if such they can be called. What has happened here is, that, although the proviso to s. 2 of the Juries Act, 1918, preserves the right of either party in a case of slander, as this was, to insist upon the issue of a writ of inquiry, it requires that an application for that writ to issue be made in accordance with rules of Court. A comparison of the words of the proviso to the section with the provisions of Order xxxvi., r. 6, as it stood at the passing of the Act would seem to indicate that the intention of the Legislature was to preserve to applicants under the proviso the same rights in relation to a writ of inquiry that applicants entitled to the benefit of r. 6 then possessed; and these rights are, I think, correctly summarized in the statement that,

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It has however to be determined, and the point may have some relevance in this case, as will appear later, whether on its true construction the section read as a whole means that, although in cases covered by the proviso leave to issue the writ cannot, if asked for, be refused, still any rule of Court on the subject must prescribe that it is to the Court or a judge that any application for leave must be made; or whether the better view of the section is that it is left possible for a rule of Court to prescribe, for example, that the necessary application be made say to a practice master in conformity with a convenient existing practice. On this point I can see nothing in the section to limit the powers of the Rule Committee, from which it seems to me to follow that it is from the rules of Court when made, and not from any provision in the statute itself, that the authority for the issue of a writ of inquiry in cases covered by the proviso to the section is derived.

Now Order xxxvi., r. 6A, the rule made to carry out the Act, provides by sub-s. 3 that the necessary application appropriate to this case must be made by summons. In fact no summons here was taken out. The writ was issued by a subordinate official in the office of the district registrar on the application of the respondent without any summons and without reference to the district registrar himself.

Upon this the question arises whether the omission to take out and file the summons—a summons on which, if taken out, no order other than an order directing the writ to issue was permissible, a summons too which required no further service on the appellant, for he had made default in appearance and was entitled to no other notice than filing the summons gave him—whether that omission made the subsequent issue of the writ a nullity, or whether the omission was at most an irregularity to which Order lxx., r. 2, applies. If that rule is applicable, the appellant has, I think, no kind of case now, for here, after writ issued on April 27 and notice of trial given him on April 30, he applied by

summons on May 6 for delivery by the respondent of a statement of claim, upon which on May 7 an order for particulars was made. By that day the appellant's solicitor was aware of the defect in procedure now insisted on, yet on May 7 he applied, as I have stated, to set aside the writ and failed; and on May 11 after a protest by his counsel he appeared and took part in the inquiry, and succeeded in reducing the damages awarded to 5*l*. If the defect was therefore an irregularity only, that irregularity was, I think, waived by the appellant beyond recall.

But was it more? In my opinion it was not. The proper procedure prior to the issue of the writ in this case, as I have held, depends entirely on the rules, and the omission here was, in my judgment, within the meaning of Order LXX., r. 1, a mere non-compliance with Order XXXVI., r. 6A (3.). It was moreover in the circumstances a non-compliance which had and could have had no effect beyond the loss to the revenue of the stamp on a summons and possibly the saving to the appellant of some small expense. It must be remembered that the judge had no option as to the order he must make on the summons if it had been taken out; his duty would have been as nearly ministerial as that of any judicial officer can be; and if such a non-compliance with a rule is not within the ambit of Order LXX., r. 1, it is to my mind difficult to conceive a case of non-compliance which would be within it. The scope of the rule is thus stated by Kay J. in *Petty v. Daniel* (1): "I have no doubt that the meaning of the rule is—that the Court or judge may, after an irregular proceeding has been taken, as in this case, either set it aside for irregularity or amend it, or otherwise deal with it as the Court shall think fit; but it is not to be treated as void."

There can be no reason in the present case for seeking to qualify the force of these words. Nor as it seems to me does the case of *Hamp-Adams v. Hall* (2), which was relied on by the appellant, negative this view when that case is examined. First of all it is not clear to me that Buckley L.J. did there

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(1) 34 Ch. D. 180.

(2) [1911] 2 K. B. 942.

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treat the service as a nullity. His view rather was that the case was not one for relief even if the service were not a nullity. Vaughan Williams L.J. however did so regard it, but for the reason, as I read his judgment, that the express prohibition in Order ix., r. 15, precluded the plaintiff, who had not complied with the rule, from proceeding by default in case of non-appearance by the defendant. There are no analogous words in Order xxxvi., r. 6A. There is no room here for the application of the principle operative in *Hamp-Adams v. Hall* (1), *generalia specialibus non derogant*.

As Lindley L.J. said in *Fry v. Moore* (2), it is difficult "to draw the exact line between an irregularity and a nullity. . . . But I think that in general one can easily see on which side of the line the particular case falls." And if in this case attention is concentrated, as I think it ought to be, on the fact that the omission here was an omission from the ordered procedure of the King's Bench Division introductory to the issue of the writ, an omission not apparent on the face of the writ itself, it becomes, if I may use the expression, a mere domestic irregularity amply covered by the words of the rule.

In my judgment this appeal entirely fails. I think it ought to be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *J. D. Arthur, for Maw & Redman, Hull.*

Solicitor for defendant: *J. N. Nabarro, for Benno Pearlman, Hull.*

(1) [1911] 2 K. B. 942.

(2) 23 Q. B. D. 398.

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MITCHELL, APPELLANT *v.* TOWNEND AND COMPANY,
RESPONDENTS.

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Jan. 13.

Landlord and Tenant—Recovery of Possession—Business Premises—Alteration from one Kind to Another—“Scheme of reconstruction or improvement”—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 13, sub-s. 1 (c).

Sect. 13, sub-s. 1 (c), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, read with s. 5, sub-s. 1, provides that no order or judgment for the recovery of possession of premises falling within the purview of the Act shall be made or given unless “the premises are bona fide required for the purpose of a scheme of reconstruction or improvement which appears to the Court to be desirable in the public interest” :—

Held, that the words “scheme of reconstruction or improvement” refer to some public scheme, as, for example, the widening of a road, or the clearing of an insanitary area, and do not cover a private project for the substitution of one kind of business premises for another.

CASE stated by Yorkshire (West Riding) justices.

On August 4, 1920, an application was made to the Goole justices by Townend & Co. (hereinafter called the respondents) under the Small Tenements Recovery Act, 1838, the Courts (Emergency Powers) Acts, 1914–1917, and the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, for a warrant for possession of a stable which had been held from the respondents by the appellant Mitchell.

At the hearing it was proved or admitted that the appellant was a weekly tenant of the stable, and that his tenancy was duly determined by notice to quit on July 12, 1920; that the rent was under 20*l.* per annum; that the appellant was a marine store dealer, who used the stable solely as a branch store for storing rags and bones, etc. Evidence was given by the respondents that the stable was bona fide required for the purpose of a scheme of reconstruction or improvement by a Mr. Pontefract, to whom the same was about to be leased, who proposed to adapt the premises to accommodate from forty to fifty women and girls in manufacturing ladies' clothing, and also use them as a training school for the employees, who would eventually be drafted into a

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factory which he contemplated erecting upon land which he had purchased in the town.

The appellant claimed that as the stable was not reasonably required by the respondents for their own occupation or for the public service, and no available alternative accommodation had been offered, he was protected by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

The respondents relied on s. 13, sub-s. 1 (c), of the Act, which, read with s. 5, sub-s. 1, provides that no order for ejectment shall be made unless "the premises are bona fide required for the purpose of a scheme of reconstruction or improvement which appears to the Court to be desirable in the public interest."

The justices issued their warrant for possession, being of opinion that the premises were bona fide required for a scheme of reconstruction or improvement as above mentioned, and the scheme appeared to them to be desirable in the public interest, Google having few manufacturing businesses, especially for women and girls. They thought that the use of the premises for a new trade employing from forty to fifty females would be preferable to its use as a marine store.

Scholefield for the appellant. The justices were wrong in holding that what was proposed by the respondents was "a scheme of reconstruction or improvement" within s. 13, sub-s. 1 (c), of the Act. The mere alteration of premises cannot amount to "a scheme of reconstruction or improvement." Those words have a well-known meaning and imply some general alteration affecting the community, such, for example, as the clearing of an insanitary area as is referred to in s. 4 of the Housing of the Working Classes Act, 1890. It would be a strange result if business premises which are protected by the Act of 1920, unless alternative accommodation is available, can be taken for the purpose of adapting them for another kind of business and calling that "reconstruction or improvement," in which case alternative accommodation need not be available. That cannot have been the intention

of the Legislature. Further, no public interest has been shown which would warrant the issuing of the warrant for possession.

[He cited *South Hetton Coal Co. v. North-Eastern News Association*. (1)]

The respondents were not represented.

LORD COLERIDGE J. In this case the question is whether the justices were right in holding that the substitution of one kind of private business for another, the substituted business allowing of the employment of forty or fifty persons, was, within s. 13, sub-s. 1 (c), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, "a scheme of reconstruction or improvement . . . desirable in the public interest." When premises are bona fide required for that purpose, and the Court thinks it desirable in the public interest, the provisions of the Act as to alternative accommodation are dispensed with, so in this case there was no offer of alternative accommodation. I am of opinion that what was proposed by the respondents does not come within the words "scheme of reconstruction or improvement." It may well be that the proposed adaptation of the premises is desirable in the interests of the proprietor and of those who would be employed; but the expression seems to imply something larger than a private interest or advantage. By the use of the words "scheme of reconstruction or improvement" something generally advantageous to the whole community is meant, such, for example, as the widening of a street, the destruction of a "rookery," or some other well-defined public improvement. In my view the justices were wrong, and consequently the appeal must be allowed.

AVORY J. I am of the same opinion. I think that what was proposed does not come within the words "a scheme of reconstruction or improvement."

SALTER J. I agree. The words in question refer to

(1) [1894] 1 Q. B. 133.

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1921 some public scheme and do not cover a private project
 MITCHELL for the substitution of one kind of business premises for
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Appeal allowed.

Solicitors for appellant : *Sharpe, Pritchard & Co., for James Gray & Son, Barnsley.*

J. S. H.

1921 TOMPKINS, APPELLANT v. ROGERS, RESPONDENT.
 Jan. 13.

Landlord and Tenant—Recovery of Possession—“Premises used for business purposes”—Dwelling House partly used as Lodging House—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 13.

Sect. 13, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides that “this Act shall apply to any premises used for business trade or professional purposes . . . as it applies to a dwelling house. . . .”

The appellant occupied a dwelling house partly for her own residence and partly for letting rooms as lodgings :—

Held, that the house was “used for business purposes” within the above section.

CASE stated by Dorchester justices.

In September, 1920, an application was made by the respondent under the Small Tenements Recovery Act, 1838, for possession of a house and premises in the appellant's occupation.

The appellant was a widow, and up to the death of her husband, seven years ago, she resided with him and their family at 30, Culliford Road, Dorchester, then occupied as a private dwelling house at a rent of 18*l*. The respondent purchased that house in January, 1920, for his private occupation, and the appellant became his tenant, which tenancy was terminated by notice to quit on September 1, 1920. The respondent became tenant of a vacant house in Dorchester for the purpose of providing alternative accommodation for the appellant. The appellant received contributions towards her support from a son living away,

and was partially dependent upon the receipts from her lodgers. The number of other occupants of 30, Culliford Road, varied from time to time, but at the date of the hearing consisted of one son, who paid for his board and lodging 20s. a week and attended to the garden, two gentlemen who jointly occupied a sitting-room and bedroom, another gentleman who occupied a middle room, and a lady who paid nothing and shared the appellant's room.

For the appellant it was contended that the occupation by her of 30, Culliford Road, by lodgers constituted an occupation of it for business, trade, or professional purposes within s. 13, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and that as the premises were not required by the respondent for other than private occupation the justices had no power to make an order for possession. It was further contended that neither in situation nor otherwise were the other premises reasonably equivalent as regards rent and suitability in all respects.

The justices were of opinion that the occupation of 30, Culliford Road, by persons other than the appellant and her son did not constitute them premises used for business, trade, or professional purposes, and that in situation and in all other respects the alternative accommodation offered was reasonably equivalent. They accordingly held that the respondent was entitled to possession of 30, Culliford Road.

The question was whether there was evidence upon which the justices could find as they did.

Trapnell for the appellant. A business may be carried on in an ordinary dwelling house. If it is, s. 13, sub-s. 1, applies. The section does not speak of "business premises"; it says that the Act shall apply to "any premises used for business," etc. In this case the appellant by using the house partly for letting lodgings was using it for business purposes. A similar use of a house has been held to be a breach of a covenant that the lessee should not carry on any trade or business therein: see *Rolls v. Miller* (1) and *Hobson v.*

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Tulloch. (1) As this house is used by the appellant for business purposes, and the respondent only wanted it for residential purposes, the justices were wrong in making an order for possession: see s. 13, sub-s. 1 (b).

The respondent was not represented.

LORD COLERIDGE J. The question is whether these premises are or are not used for business purposes within s. 13, sub-s. 1, of the Act. If the house is not used for business purposes the justices were justified in making an order for possession, inasmuch as the landlord, within s. 5, sub-s. 1 (d), reasonably required it for occupation as a residence for himself, subject to alternative accommodation being available for the tenant. If, however, the house comes within the provision of s. 13, sub-s. 1, as business premises the order is invalid because the landlord does not require it for business, trade or professional purposes. What we have to decide is whether there was any evidence upon which the justices could come to the conclusion that these premises were not business premises within the meaning of the Act. It is found as a fact that the appellant has carried on in the house the occupation—if I may use that neutral term—of a lodging house keeper, and was carrying it on at the time the order was made. She had several people in the house who paid for board and lodging; there were several gentlemen, all of them paying guests, and a lady who no doubt for some reason connected with the carrying on of the boarding house paid nothing but deprived the appellant of the sole use of her own room. It was held in *Rolls v. Miller* (2) that a house used as a “Home for Working Girls”—a charitable institution—came within the restrictions of a covenant by the lessees that they should not use the house for any trade or business. So, too, in *Hobson v. Tulloch* (1), where there was a similar covenant, and the defendant used the house as a boarding house for scholars attending a school, it was held that the defendant was carrying on a species of business.

(1) [1898] 1 Ch. 424.

(2) 27 Ch. D. 71.

I have no hesitation in coming to the conclusion that this house was being used for business purposes, the appellant getting her living mainly by so using it; and that the justices had no evidence before them entitling them to find otherwise. That being so, the question of the suitability, etc., of the alternative house accommodation offered does not arise. The appeal will be allowed.

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Lord Coleridge J.

AVORY J. I agree.

SALTER J. I agree. Sect. 13, sub-s. 1, provides that the Act applies to "any premises used for business trade or professional purposes." The premises may be a dwelling house, but if the house is used for business purposes the section applies.

Appeal allowed.

Solicitors for appellant: *Neave, Morton & Co., for Logan & Morton, Dorchester.*

J. S. H.

[IN THE COURT OF APPEAL.]

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Feb. 4, 8.

OWNERS OF SS. MAGNHILD *v.* McINTYRE BROTHERS
AND COMPANY.

Shipping—Charterparty—Hire—Provision for Cesser of Hire—"Or other accident"—Ejusdem generis Rule—Construction of Charterparty—"Shallow harbours, rivers, or ports where there are bars."

A steamship was chartered for six months at a certain rate of hire per month and was to be employed between safe ports within defined limits. Clause 12 of the charterparty provided that "in the event of loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, the hire shall cease from the commencement of such loss of time until she be again in an efficient state to resume her service; but should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars, causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account."

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During the currency of the charterparty the steamer was ordered to discharge at Marans, which was situated up a river. While proceeding up the river to that port she got aground on soft clay, and remained aground for eight days. She was damaged by the occurrence, and the repairs occupied a substantial time. Marans was a safe port, and there was no bar in the harbour, river, or port. In an arbitration between the owners and charterers the arbitrator awarded that hire ceased (a) during the time the steamer was aground, and (b) during the time occupied while the damage to the steamer consequent upon the grounding was being repaired. McCardie J. affirmed the award:—

Held, agreeing with McCardie J. on this point, that the ejusdem generis rule could not be applied to the words “or other accident” in the first part of clause 12, and that those words covered any accident to the steamer preventing her working for more than twenty-four consecutive hours; but reversing the judgment of McCardie J., that the words “where there are bars,” in the second part of clause 12, which was a qualification of the first part, applied only to “ports,” and not to shallow harbours or rivers, and as the grounding which caused the detention took place when the steamer was trading to a river, the time so lost was for charterers’ account.

Judgment of McCardie J. [1920] 3 K. B. 321 reversed.

APPEAL from the judgment of McCardie J. upon an award stated in the form of a special case.(1)

The award in the form of a special case involved the construction of a charterparty between the owners of the steamship *Magnhild* and McIntyre Bros. & Co., the charterers.

The charterparty was dated August 7, 1916, and was in the form known as the Baltic and White Sea Conference Uniform Time Charter, 1912, for European, etc., Trade (as revised at Berlin in 1912). It contained (inter alia) the following clauses. Clause 1: “The said owners agree to let, and the said charterers agree to hire the said steamer for the term of six calendar months fifteen days more or less from the time . . . the said steamer is delivered and placed at the disposal of the charterers ready to load . . . to be employed in lawful trades . . . between good and safe ports or places within the following limits—United Kingdom, Continent, Calais/Sicily limits—where she can always safely lie afloat or safe aground as charterers or their agents shall direct.” Clause 5: “The said charterers shall pay as hire for the said steamer 3,400*l.* per calendar

(1) [1920] 3 K. B. 321.

month, commencing from the time the steamer is placed at the disposal of charterers until her re-delivery to owners as herein stipulated. The payment of the hire shall be made as follows: In London in cash, without discount, monthly in advance." Clause 12 (the marginal note of which was "Breakdown"): "In the event of loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, the hire shall cease from the commencement of such loss of time until she be again in an efficient state to resume her service; but should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account." Clause 16 (the marginal note of which was "Excluded ports." "Ice."): "The steamer shall not be ordered to any port where fever or pestilence is prevalent or any ports blockaded or where hostilities are being carried on or any ice-bound port or any ports where lights or lightships are or are about to be withdrawn by reason of ice or war, or where there is risk that in the ordinary course of things the steamer will not be able on account of ice to enter the port or to get out after having completed loading or discharging, nor shall steamer be obliged to force ice. Should the steamer be detained by any of the above causes such detention shall be for charterers' account. Nevertheless, if on account of ice captain should consider it dangerous to remain at port of loading for fear of steamer being frozen in and/or damaged, he shall have liberty (but not be obliged) to sail to a convenient open place and await charterers' fresh instructions."

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The charterparty provided that any dispute arising under the charter should be referred to arbitration in London of two arbitrators, one to be appointed by each party, and

C. A. an umpire. The arbitrators having failed to agree, the
1921 umpire stated his award in the form of a special case.

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The facts as found by the umpire were shortly as follows :—
The steamer loaded at Sunderland and was fixed by the charterers to discharge at La Rochelle, La Pallice, Rochefort, or Tournay Charante in France. By the instructions of the French Government the steamer was ordered to proceed to the Ile d'Aix for orders. She was then ordered by the French Government to discharge at Marans, which was situated up a river. She arrived at Marans Roads at 6 P.M. on October 16, 1916, and she got aground on soft clay whilst proceeding up the river at a little bend between two buoys. She remained so aground till 1 P.M. on October 24, 1916. She then got off. She was damaged by the occurrence. Repairs commenced on or about November 8 and they occupied a substantial time. Marans was a safe port within the meaning of the charterparty. There was no bar in the harbour, river, or port which caused detention through grounding or otherwise. The arbitrator awarded that hire ceased, (a) as from 6 P.M. on October 16, 1916, till 1 P.M. on October 24, 1916, while the steamer was aground as aforesaid, and (b) during the time occupied while the damage to the steamer, consequent upon such grounding, was being repaired; and he awarded that the owners should pay to the charterers as return of hire a certain sum.

The question for the opinion of the Court was whether the umpire was right in his award. If the Court should be of opinion that he was wrong, then he awarded that the charterers should pay to the owners a certain sum.

McCardie J. held that the ejusdem generis rule could not be applied to the words "or other accident" in the first part of clause 12; that those words covered any accident to the steamer which prevented her working for more than twenty-four consecutive hours; and that therefore the award was right.

The owners appealed.

Leck K.C. and *Jowitt* for the appellants. The ejusdem

generis rule applied to the words "or other accident" in the first part of clause 12 of the charterparty. The words refer to something which makes the steamer, as a steamer, inefficient to prosecute the voyage. The damage to the steamer did not prevent her from proceeding to Marans. The grounding on the soft clay was not an "accident" within the meaning of clause 12. The relevant authorities on the ejusdem generis rule are set out in the judgment of McCardie J.

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Next, if the grounding was an "accident" within the meaning of clause 12, the second part of the clause applies, and prevents the cessation of hire in the cases there specified. It is a limitation upon what might otherwise come within the first part of the clause. If the detention arises through the steamer trading to "shallow harbours," "rivers," or "ports where there are bars," and grounding, time so lost is to be for charterers' account. The words "where there are bars" is confined to "ports." The punctuation shows that the words "where there are bars" cannot apply to "shallow harbours." "Rivers" is general. The detention here was caused by the steamer trading to a river and grounding there, and the time so lost is to be for charterers' account. The learned judge does not seem to have dealt with this point.

Stuart Bevan K.C. and *Cloughton Scott* for the charterers were only called upon on the second point. The words in the latter part of clause 12, "where there are bars," apply to each of the three preceding places, "shallow harbours, rivers, or ports." The object of the clause is to prevent the ship trading to a shallow harbour, river, or port, where in any of those places there is a bar. To bring this part of clause 12 into operation there must be a bar in one of those places which causes detention through grounding or otherwise. The view contended for by the owners would bring all rivers, however deep and wide, within this part of the clause. This could never have been intended. "Shallow" before "harbours" is on this view superfluous, but superfluous words are often found in charterparties.

C. A. Punctuation cannot be accepted as a guide in construing a
1921 charterparty. The case therefore comes within the first part
SS. of clause 12, and is not taken out of it by the second part.
MAGNILD *Leck K.C.* in reply.
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Feb. 8. BANKES L.J. This is an appeal from the judgment of McCardie J., who affirmed the view taken by the umpire in an arbitration as to the proper construction of a clause in a time charter. The charter was dated August 7, 1916, whereby the charterers hired the vessel for a period of six calendar months at the rate of 3400*l.* per month. [The Lord Justice stated the facts as found by the umpire.] The question in dispute between the parties is whether, during the time when the vessel was aground and in dock undergoing repairs rendered necessary by the grounding, hire ceased under the terms of the charterparty, or whether the charterers still remained liable to pay hire.

The question turns upon the proper construction of clause 12 of the charterparty. (That clause is in the nature of an exception clause. It deals with cesser of hire, and is divided into two parts. The first part deals with the circumstances under which, if there is loss of time, the hire shall cease; and the second part, which to some extent is an exception upon the exception, enumerates circumstances in which time lost shall be for charterers' account.) The first part of the clause is in these terms: "In the event of loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, the hire shall cease from the commencement of such loss of time until she be again in an efficient state to resume her service." Now three matters are there specifically mentioned which may occasion loss of time: Deficiency of men or owners' stores, breakdown of machinery, damage to hull; and then there is added "or other accident." The judgment of McCardie J. is entirely devoted to a consideration of the question whether the ejusdem generis rule applies to that

language, and whether the particular accident which befell this vessel, the grounding in the river, was or was not an "other accident" within the meaning of the first part of this clause. He held that the ejusdem generis rule did not apply, and for that reason he considered that the loss of time fell upon the shipowners. He gave his reasons at length and referred to a number of cases, and at the end of his judgment he gives this as one of the reasons for so holding (1) : "The latter part of clause 12, I also think, seems to assume a wide meaning of the first part." To my mind it seems reasonably plain that the ejusdem generis rule cannot be applied, partly because of the language of the first part of the clause, and partly also for the above-mentioned reason given by McCardie J.

The learned judge does not refer to what seems to me to be the material part of this clause, the proper construction of which has caused me personally great difficulty. It certainly is not very happily worded ; it does not clearly express what was the intention of the parties. The second part of the clause, as I have said, is an enumeration of the circumstances under which a loss of time is to be for charterers' account. It runs : "But should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account." Now it is plain from that language that it is to some extent, but only to some extent, an exception upon an exception, because it includes some matters which do not come within the first part of the clause. It is therefore not only an exception upon an exception, but it is an express enumeration of events, as to which presumably it was thought that some question might arise unless it was made plain that they were all for charterers' account. The circumstances are very diverse in character. "Should the steamer be driven into port, or to anchorage by" certain events, then "time so lost and expenses incurred (other than repairs) shall

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be for charterers' account." Those events are stress of weather or any accident to the cargo. Then follow the words which cause so much difficulty. There are two possible constructions of those words. One is to read them as meaning that if the vessel trades to shallow harbours, rivers, or ports in any of which places there are bars causing detention to the steamer through grounding or otherwise, then time so lost and expenses incurred shall be for charterers' account. The other is to read them as providing that, in the event of the steamer trading to either of these three classes of places, (a) shallow harbours, (b) rivers, or (c) ports where there are bars, and the trading there causes detention through grounding or otherwise, time so lost and expenses incurred shall be for charterers' account. One must try to give a meaning to all the words used, so as to realise the intention of the parties in inserting them in the clause. Having regard to the language used it seems to me that the meaning of the parties may properly be taken to be that in the event of the detention of the steamer through grounding or other similar accident owing to the charterers ordering her to trade to a shallow harbour, or to a river, or to a port where there is a bar, time so lost and expenses incurred shall be for charterers' account. I think that is what the parties must have intended by using this language, and I think their intention is sufficiently indicated if one gives a meaning to all the parts of the clause. I infer from the form of the umpire's finding that he read the clause as though, in order to give the owners the benefit of this part of the clause, there must have been a grounding upon some bar; and I assume that McCardie J. took that view also, although he does not mention it in his judgment. In my opinion that view does not give any meaning to the expression "shallow harbours." There was no need to use the word "shallow" in reference to "harbours" if what was contemplated was merely a grounding upon a bar. I think the meaning of the clause is that which I have already stated.

It is not necessary in this case to decide what meaning ought to be attached to those very general words "or otherwise" which follow "grounding." It is sufficient for me to

say that my present opinion is that the ejusdem generis rule should be strictly applied to those words. We have, however, only to deal with a grounding, and giving the best consideration I can to this clause it appears to me that this grounding in the river causing detention to the steamer and occurring when the steamer was trading to the river, comes within the second part of clause 12, and the time so lost and expenses incurred (other than repairs) are to be for charterers' account.

For these reasons the appeal must be allowed, and the answer to the question in the special case must be in accordance with my judgment.

WARRINGTON L.J. I am of the same opinion. The question turns on the construction of one clause in a time charter. The clause is this: "In the event of loss of time from deficiency of men or owners' stores," which is one thing, "breakdown of machinery," which is a second, "or damage to hull," which is a third, "or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, the hire shall cease from the commencement of such loss of time until she be again in an efficient state to resume her service." Pausing there, I think the construction of that clause so far is fairly plain, and I agree with the extremely elaborate judgment of McCardie J. on that point, though I think the result might have been obtained in a shorter and more direct way. The words on which so much discussion turned are "or other accident preventing the working of the steamer." It seems to me that there is no difficulty in construing those words, and that they cover any accident which prevents the working of the steamer. So far I agree with the judgment of the learned judge, and had there been nothing more in the clause the grounding of the vessel in the river to which she was directed to go would have been, within the meaning of that part of it, an "accident preventing the working of the steamer." But that exception from the time which is to be paid for by the charterers is qualified by the words which follow. Those words begin in this way, "but should the steamer." It

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Bankes L.J.

C. A. seems to me that the mode in which that clause commences
 1921 clearly shows that it is intended as a qualification of the wide
 SS. provision contained in the previous words. The clause reads,
 MAGNHILD "but should the steamer be driven into port, or to anchorage
 v. by stress of weather, or from any accident to the cargo, or in
 McINTYRE the event of the steamer trading to shallow harbours, rivers,
 BROTHERS. & Co. or ports where there are bars causing detention to the steamer
 Warrington L.J. through grounding or otherwise, time so lost and expenses
 incurred (other than repairs) shall be for charterers' account."
 The events there referred to as causing detention are, first,
 the steamer being driven into port or to anchorage by stress
 of weather or from any accident to the cargo. With those
 we are not concerned. We are only concerned with the
 second class of events referred to, namely, "or in the event
 of the steamer trading to shallow harbours, rivers, or ports
 where there are bars" causing detention through grounding.
 We are not concerned with anything but the detention caused
 by grounding.

The first thing to be determined is, what is the meaning of
 the words "trading to shallow harbours, rivers, or ports where
 there are bars." The umpire has obviously taken the view
 that the words "where there are bars" qualify "shallow
 harbours, rivers, or ports," that is, all three of the places
 mentioned; and it was so contended before us on the part
 of the charterers. In my opinion, that is not the grammatical
 construction of this part of the clause. (I think the place of
 the word "or" indicates that there are three categories of
 places all put under the same conditions, and those are
 "shallow harbours," "rivers," and "ports where there are
 bars." All those places are treated by the parties as places
 where detention may be caused to a ship trading thereto.)
 In shallow harbours the detention may be caused by the ship
 getting aground in the harbour; in rivers the detention may
 be caused, as it was in this case, by the ship having to go in a
 shallow channel, or in a narrow channel round what the
 umpire has described as "a little bend" in the river; in
 ports where there are bars the detention may be caused by
 the ship going aground on the bar, or, possibly, having to

wait until there is sufficient water for her to cross the bar. (I think, therefore, that the word "rivers" is not qualified by the subsequent expression "where there are bars.") That being so, we have still to consider what it is that is described as "causing detention," and I agree with Bankes L.J., that what is there referred to as "causing detention to the steamer through grounding" is the fact of her trading to one or other of the three categories of places described. If she is ordered to trade to a river, and the result of her being so ordered is that detention is caused through grounding, then the charterers are to be the parties who are to suffer by the detention so caused.

For these reasons I think that the appeal ought to be allowed, and the question answered in favour of the owners.

ATKIN L.J. I agree, and I am bound to say that I have had great difficulty in putting a reasonable construction upon this clause, which seems to me so framed as to give rise to very serious difficulty in the way of construction. As to the first part, on which McCardie J. concentrated his judgment, I do not find it necessary to say anything. I think it is sufficient to assume that the words "other accident" there are words of large import and need not necessarily be construed with reference to the preceding words upon the ejusdem generis doctrine, as to which I find it quite unnecessary to speak with any kind of disrespect.

To my mind the real difficulty in the case arises out of the second part of the clause, and it is unfortunate that we have not been assisted in that difficulty by the opinion of the learned judge. (The words of the second part are intended to be an exception to the first part of the clause, but only in part, because it is plain to my mind that they go beyond the scope of a mere exception, and, for extra caution no doubt, provide that in certain events detention shall be for charterers' account, even though there is no previous provision excepting such accidents from being for charterers' account.) The second part of the clause begins as follows: "Should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo." To the antecedent, "Should the steamer

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MAGNILD

v.

McINTYRE
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Warrington L.J.

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be driven into port, or to anchorage by stress of weather, or from any accident to the cargo," the consequent is "time so lost and expenses incurred (other than repairs) shall be for charterers' account." So far that clause, it seems to me, has no reference to grounding. Then the form of language changes—"or in the event of the steamer trading," etc. How is the event defined in that part of the clause? It has been read by the umpire and by the learned judge presumably as being this, that if the steamer trades to shallow harbours where there are bars causing detention to the steamer, or to rivers where there are bars causing detention to the steamer, or to ports where there are bars causing detention to the steamer, then time so lost shall be for charterers' account. Now that does not seem to me to be a reasonable construction, because to my mind a reference to a shallow harbour having a bar is something which would never have occurred to anyone to provide against specially, and I find it very difficult to picture in my mind what could be meant by such a combination as that even by persons who are well versed in nautical matters. There certainly is nothing before us to show that there was some special class of shallow harbour with a bar which the parties would have been likely to guard against. On the contrary, it seems to me that what the parties are guarding against is not the bar of a shallow harbour, but the shallowness of the harbour; and if that is so, as I think it is, then (the qualifying words, "where there are bars," must be read, not as applying to shallow harbours or to rivers—though in many cases a river has a bar—but as applying only to ports.) Therefore the clause would read grammatically in this way: "In the event of the steamer trading to shallow harbours causing detention to the steamer through grounding or otherwise, or in the event of the steamer trading to rivers causing detention to the steamer through grounding or otherwise, or in the event of the steamer trading to ports where there are bars causing detention to the steamer through grounding or otherwise." In all those cases there is a common differentia in respect of each of the subjects enumerated, namely, an increased peril of grounding either by reason of the shallowness of the harbour, or by reason of

the well known attribute of tidal rivers where there is at any rate a narrow channel, or by reason of the fact that there is a bar ; and it appears to me that the object of the clause must have been to protect the owners from the extra risk involved by the ship being ordered to such places as are mentioned. Where there is that extra risk I think it is intended that the charterers should take it.

I am confirmed in this view by reference to clause 16, which again is not a well-constructed clause, because it begins by excluding certain ports : " The steamer shall not be ordered to any port where fever or pestilence is prevalent or any ports blockaded or where hostilities are being carried on or any icebound port or any ports where lights or lightships are or are about to be withdrawn by reason of ice or war, or where there is risk that in the ordinary course of things the steamer will not be able on account of ice to enter the port or to get out after having completed loading or discharging, nor shall steamer be obliged to force ice." Then the clause goes on : " Should the steamer be detained by any of the above causes such detention shall be for charterers' account." That is a provision that might very well have been brought into the clause which is an exception to the cesser of hire clause, but it is put into clause 16, and it makes it plain that, in the case of those ports where there is an extra risk to the ship, in the first place the ship is not to go there at all, but if the ship does go there the detention is to be for charterers' account.

In my opinion therefore the latter part of clause 12 means that in the event of the steamer trading to shallow harbours time lost and expenses incurred by reason of such trading to a shallow harbour causing detention to the steamer through grounding or otherwise shall be for charterers' account, and so as to rivers, and so as to ports where there are bars. That construction gives full effect to the clause and to every word in it ; it does not strain the grammatical meaning ; and it avoids a meaning which it appears to me the words are incapable of bearing, namely, making " where there are bars " apply to shallow harbours. For these reasons it seems to me that in this case the award was wrong. The question for the

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C. A. opinion of the Court put by the umpire is "whether I am right
 1921 in my award." The answer, I think, should be that the Court
 SS. is of opinion that the umpire is wrong, and upon that answer
 MAGNHILD the umpire has proceeded to make his alternative award,
 v. and that award will take effect.
 MCINTYRE
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 & Co. The result is that the appeal will be allowed.

Appeal allowed.

Solicitors for owners : *Botterell & Roche.*

Solicitors for charterers : *William A. Crump & Son.*

W. F. B.

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BROOKE v. THE KING.

Petition of Right—Requisition of Ships by Government—Agreement as to Rate of Hire—Claim for Breach of Contract—Jurisdiction of Court—Indemnity Act, 1920 (10 & 11 Geo. 5, c. 48).

By s. 1 of the Indemnity Act, 1920, it was provided that the general prohibition contained in that section against the institution in any court of law of legal proceedings (including a petition of right) for any act, matter or thing done during the war, if done in good faith and in the public interest, by any person holding office in the service of the Crown should not prevent the institution of proceedings for breaches of contract, except in cases where a claim for payment or compensation could be brought under s. 2 of the Act.

By s. 2, sub-s. (1) (a), the owner of a ship requisitioned by the Government during the war was to be entitled to payment for its use, which payment was to be assessed by a tribunal called the "Board of Arbitration" and upon the principles set out in the Schedule to the Act. According to those principles the payment was to be based upon what were known as the "Blue Book rates," "subject to such increases or modifications thereof as may have been agreed to before January 1, 1920," or, in cases where those rates had not been applied, on some other estimate of the profits which the owner could have made if there had been no war, and was to be assessed without reference to the increase in the market value of tonnage due to the war.

Certain ships were requisitioned in 1918, in respect of which the Admiralty had previously agreed with their owner that if they were requisitioned they should be paid for at the market rate and not at the Blue Book rates. The owner claimed in a petition of right to be paid the free market rate. The Admiralty claimed that the rates payable

were fixed by an Order known as the Limitation of Freights (French Ports) Order, 1918, and that in any event the matter was not within the jurisdiction of the Court. On the plea to the jurisdiction of the Court:—

Held, that the terms of the Admiralty agreement were not a modification of the Blue Book rates within the meaning of the Schedule, that the principles of the Schedule being inconsistent with those terms were not applicable to the suppliant's claim, that his claim for payment consequently did not come within s. 2, sub-s. (1) (a), and that the jurisdiction of the Court to deal with the matter was not transferred to the Board of Arbitration.

Quære, whether a breach of contract is an "act, matter or thing done" within the meaning of s. 1, and whether consequently the Act has any application to a breach of contract at all?

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TRIAL of petition of right before Roche J.

Immediately after the outbreak of war in August, 1914, the Admiralty commenced to requisition ships, paying hire to their owners not at market rates but at other rates, known as "Blue Book rates," and as market rates rose ships which, by reason of their being owned by neutrals or for other reasons, were free from requisition became of much greater value than ships which were subject to requisition. There were at the outbreak of war a number of ships, both British and neutral, in the Baltic, which were detained there by fear of capture or destruction by enemies in the event of their attempting to escape out of that sea. Amongst those ships were the *Duva* and the *Cumbrian*, which were the property of British owners. By way of inducement to the owners of ships so detained in the Baltic to try and escape therefrom the Board of Trade, in a letter dated July 4, 1916, and addressed to "The Secretary of the Baltic Mercantile and Shipping Exchange," wrote as follows:—"Dear Sir, British Shipping in the Baltic. The Admiralty have informed the Board of Trade that they are prepared to guarantee that any British ships which escape from the Baltic up to the end of March, 1917, will either not be requisitioned, or, if through some special emergency they have to be requisitioned, they will be paid market rates and not Blue Book rates." Relying on that letter and guarantee the then owners of the *Duva* and the *Cumbrian* at considerable risk procured their escape from the Baltic at some time before the end of March, 1917. In

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July, 1916, the suppliant, T. E. Brooke, who is a shipowner carrying on business in London, bought the *Duva* from her then owners and in June, 1917, he bought the *Cumbrian*. In reliance on the terms of the Admiralty guarantee contained in the above letter of July 4, 1916, he paid for them much higher prices than he would have done if they had been subject to requisition in the ordinary way.

The suppliant having acquired these ships let them on charter for the carriage of coal to the northern ports of France, that being the trade to which they were best adapted. The rate at which he chartered them was 41s. per deadweight ton per month. By two orders dated February 5, 1918, addressed to the suppliant the Ministry of Shipping requisitioned the said two ships, at the same time stating that the rate of hire would be "in accordance with the undertaking given in respect of vessels which were formerly in the Baltic." On the same date there was issued an Order called the Limitation of Freights (French Ports) Order, 1918, whereby the rate of freight per ton of coal carried between the United Kingdom and the French ports to which the suppliant's ships traded was not to exceed 28s. That Order came into force on February 11, 1918. The *Duva* remained under requisition until March 28, 1918, when she was sunk by enemy action. The *Cumbrian* remained under requisition down to March 4, 1919, when she was released. The Shipping Controller paid to the suppliant for the use of the said ships a sum based on the rate of 28s. allowed by the Limitation of Freights Order and refused to pay any more. The suppliant by his petition of right claimed that he was entitled to be paid at the full market rate, which he alleged to be 80s. 3d. per ton per month, and prayed judgment for a sum representing the difference between those two rates.

The Attorney-General by his answer and plea alleged that notwithstanding the Admiralty's undertaking of July 4, 1916, the suppliant was not entitled to more than the rate allowed by the Limitation of Freights Order, and also that by reason of the Indemnity Act, 1920, the Court had no jurisdiction to entertain the proceedings.

Sir John Simon K.C., R. A. Wright K.C., and Le Quesne
for the suppliant. The Indemnity Act, 1920, has no appli-
cation. It enacts by s. 1 that no legal proceeding (including
a petition of right) shall be brought in any court of law for
anything done during the war in good faith and in the public
interest by any officer of the Crown, "provided that, except
in cases where a claim for payment or compensation can be
brought under section two of this Act, this section shall not
prevent (b) the institution or prosecution of proceedings in
respect of . . . breaches of contract." (1)

(1) By s. 1, sub-s. (1) of the Indemnity Act, 1920: "No action or other legal proceeding, . . . shall be instituted in any court of law for or on account of or in respect of any act, matter or thing done, . . . during the war before the passing of this Act, if done in good faith, and done or purported to be done in the execution of his duty or for the defence of the realm or the public safety, . . . or otherwise in the public interest, by a person holding office under or employed in the service of the Crown, . . . and if any such proceeding has been instituted, . . . it shall be discharged and made void,

"Provided that, except in cases where a claim for payment or compensation can be brought under section two of this Act, this section shall not prevent:

"(b) the institution or prosecution of proceedings in respect of any rights under, or alleged breaches of, contract. . . ."

Sub-s. (2): "For the purposes of this section, a petition of right shall be deemed to be a legal proceeding. . . ."

(2) By s. 2, sub-s. (1): "Notwithstanding anything in the foregoing section restricting the right of taking legal proceedings, any person . . . :

"(a) Being the owner of a ship or vessel which . . . has been

requisitioned at any time during the war, . . . shall be entitled to payment or compensation for the use of the same, . . . and compensation for loss or damage thereby occasioned; or

"(b) Who has otherwise incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise . . . during the war of any prerogative right of His Majesty, . . . shall be entitled to payment or compensation in respect of such loss or damage."

Sub-s. (2): "The payment or compensation shall be assessed in accordance with the following principles:—

"(ii.) Where the payment or compensation is claimed under paragraph(a) of sub-section(1) of this section, it shall be assessed in accordance with the principles, . . . set forth in Part I. of the Schedule to this Act."

"(iii.) In any other case compensation shall be assessed" on the principles therein stated.

Sub-s. (4): "The tribunal for assessing payment or compensation shall, . . . in

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The plea to the jurisdiction turns on the question whether the suppliant's claim could be brought under s. 2 (2.). That section by sub-s. 1 provides that any person (a) "being the owner of a ship . . . which has been requisitioned at any time during the war . . . shall be entitled to payment or compensation for the use of the same." And by sub-s. 2 (ii.) and sub-s. 4 where the payment of compensation is claimed under s. 2, sub-s. 1 (a), it shall be assessed by the Board of Arbitration in accordance with the principles set forth in Part I. of the schedule to the Act. (1) Here the suppliant's ships were requisitioned, but it is not every owner of a requisitioned ship that comes within sub-s. 1 (a). To bring him within that sub-section it is necessary that his claim for payment should be capable of being assessed on the principles in the schedule. But the suppliant's claim is not capable of being so assessed. According to the schedule the payment is to be based on the Blue Book rates without taking into account any increase of market value of tonnage due to the war; and that is in direct contradiction of the Admiralty's contract of July 4, 1916. Nor does the case fall within s. 2, sub-s. 1 (b). For that sub-section only refers to an injury from some act done; it speaks of "direct loss or damage by reason of interference with his property or business"—words which are not apt to include damage from breach of contract.

Sir Gordon Hewart A.-G. and *Ricketts* for the Crown.

cases where the claim is made under paragraph (a) of sub-section (1) of this section be the Board of Arbitration, and in any other case be the Defence of the Realm Losses Commission."

(1) By Part I. of the Schedule
"The payment or compensation to be awarded for the use of a ship . . . shall be based on the rates and conditions contained in the Blue Book reports, or in cases of a class where those rates and conditions have not been applied on some other liberal estimate of the profits which

the owner could have made if there had been no war, and shall be assessed without taking into account any increase of market values of tonnage or of rates of hire due to the war. . . .

"For the purposes of this Part of this Schedule the expression 'Blue Book reports' means the reports as to rates and conditions published in October, 1914, by the sub-committee of the Board of Arbitration, subject to such increases or modifications thereof as may have been agreed to before the first day of January, 1920."

Notwithstanding the terms of the Admiralty's contract that the suppliant should be paid at market rates and not at Blue Book rates the principles set forth in Part I. of the schedule are applicable to his ships. For by the schedule the owner is to be paid, not the Blue Book rates simpliciter, but the Blue Book rates "subject to such increases or modifications thereof as may have been agreed to before January 1, 1920." The Admiralty agreement, which was made before January 1, 1920, was a "modification" of those rates. That the suppliant should be paid at the rate provided by the agreement is therefore in accordance with the principles of the schedule. That being so the claim is within s. 2 of the Act, and the suppliant ought to have taken it before the Board of Arbitration. This Court has no jurisdiction. By the terms of the agreement the suppliant was no doubt entitled to be paid the market rate, but since the Limitation of Freights Order came into force the rate then fixed became the market rate, for it was the maximum rate that was obtainable by ships engaged in the suppliant's particular trade. The suppliant has therefore received the agreed remuneration.

Sir John Simon K.C. in reply. The Admiralty agreement is not a modification of the Blue Book rate. The Crown's contention gives no value to the provision that the payment "shall be assessed without taking into account any increase of market values of tonnage . . . due to the war." It is sufficient answer to the point under the Limitation of Freights Order, to say that the Government cannot have intended by that Order to repudiate their own contract. Moreover the suggestion that the rate fixed by the Order became the market rate leaves out of sight that the Order did not bind neutral vessels.

ROCHE J. This is a petition of right. The suppliant, a shipowner, by his petition prays for the payment by the Crown of a sum of money for the use of two of his ships, which money he claims to be entitled to under a contract. On July 4, 1916, His Majesty's Government, being anxious to increase the amount of shipping available for the use of this

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country, desired to encourage shipowners to bring out of the Baltic a number of ships which were interned there by fear of the blockading force of the German Empire. Accordingly on that date a letter was addressed by the Board of Trade to the Shipping World in general to the following effect : (his Lordship read the letter). In consequence of the undertaking contained in that letter a number of ships made their escape from the Baltic, and amongst them the *Duva* and the *Cumbrian*. In January and June, 1917, the suppliant bought those two ships from their then owners with the benefit of the undertaking attaching to them, namely, that they would not be requisitioned unless in the event of some special emergency, and that if they were requisitioned they would be paid for at market rates and not Blue Book rates, and he naturally had to pay a larger price for them than he would have had to give if they had been subject to the ordinary liability of a British ship to requisition. The suppliant had the free use of his ships until February, 1918, when they were requisitioned by the Shipping Controller in consequence of the great need of the allies for shipping tonnage to take coal, amongst other things, to France. The question now in dispute is as to the rate of payment applicable for the use of these vessels. The Crown, of course, does not dispute that the undertaking is one which it is bound to honour, but contends that the payment of 28s. per dead weight ton per month is a satisfaction of that undertaking, that being the rate which was laid down as payable for ships of this class engaged in the coal trade with France by an Order known as the Limitation of Freights (French Ports) Order, 1918. It is said that that rate of 28s. was the "market rate" within the meaning of the agreement.

But before dealing with that I must first deal with an objection in point of law made by the Attorney-General to the hearing of this petition. He says that by reason of the Indemnity Act of 1920 the petition is "discharged and made void." In my opinion that objection fails. I will assume, though I do not decide, that the first paragraph of s. 1, sub-s. 1, of that Act, if it stood by itself would bar the right of the suppliant to present this petition. I do not decide it because

I am by no means satisfied that a breach of contract is an "act matter or thing done" within the meaning of that sub-section. But I will assume that it is. The matter does not rest there, for there follows a proviso that the section shall not prevent the institution of proceedings (which by sub-s. 2 includes a petition of right) for, amongst other things, breaches of contract. Then to that proviso there is an exception "in cases where a claim for payment or compensation can be brought under Section two of this Act." Now s. 2 provides in sub-s. 1 (a) that the owner of a ship which has been requisitioned shall be entitled to payment or compensation for its use, but then it goes on in sub-s. 2 to limit the application of that provision to cases in which the payment or compensation is capable of being assessed in accordance with the principles in Part I. of the schedule. When one turns to the schedule one finds that the payment is to be based on the rates contained in the Blue Book, or, in cases in which those rates have not been applied, on the basis of the profits which the owner would have made if there had been no war, and in either case the payment is to be assessed without taking into account the increase of market values of tonnage due to the war; and finally by another paragraph Blue Book rates are defined to mean the rates published by the Board of Arbitration in October, 1914, subject to such increases or modifications as may have been agreed to before January 1, 1920. The substance of the Attorney-General's argument on this part of the case is that the agreement in the letter of July 4, 1916, constitutes an increase or modification of the Blue Book rates. He contends that the claim consequently falls within s. 2, sub-s. 1 (a), and ought not to be made before this Court but before the Board of Arbitration under s. 2, sub-s. 2 (ii.) and sub-s. 4. With that contention I cannot agree. A provision that the Blue Book rates shall not be applied, but that certain other rates shall, cannot aptly be described as an increase or modification of the Blue Book rates. Moreover it is plain that the paragraph in the schedule as to increases or modifications of the Blue Book rates only applies to a case within the first branch of the earlier paragraph relating to cases

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where Blue Book rates are themselves applicable, whereas the present case, if it fell within the schedule at all, would be one of the class to which those rates could not be applied. In my opinion the schedule has no application to the present case, for it in effect provides that in the assessment of the payment no attention shall be paid to market rates, whereas the Admiralty agreement provides the exact contrary. Then the Attorney-General alternatively contends that if the case does not fall within s. 2, sub-s. 2 (ii.), it falls within sub-s. 2 (iii.) which says that "In any other case compensation shall be assessed" as there provided, that is by the Defence of the Realm Losses Commission according to the principles in Part II. of the schedule. But that sub-section has no application. This is not a case in which compensation is claimed at all. What is claimed is the payment of an agreed sum of money under a contract. If such a payment were to fall within s. 2, sub-s. 2 (iii.), it would be difficult to imagine any payment or compensation which would not fall within one or other of the provisions of s. 2, and in that case there would be nothing left to which the saving part of the proviso in s. 1 could apply. I hold that the objection to the jurisdiction of this Court fails.

It remains to consider whether the suppliant is entitled to be paid more than he has already been paid, and if so how much. It was contended that when the Limitation of Freights Order came into force it fixed the market rate for the trade in which the suppliant's ships were actually engaged, and that that rate being so fixed became the "market rate" within the agreement of July 4, 1916. But I think that that is not a fair interpretation to put upon the agreement. "Market rate" was there contrasted with "Blue Book rate," and I think that what was meant was that the Admiralty undertook to pay such a rate as the suppliant's ships would be able to get in a free market where there was open competition. I hold that the suppliant's right is not limited to the 28s. per ton fixed by the Limitation of Freights Order. [His Lordship then proceeded to deal with the question of the rate which would have been obtainable in a free market, and upon the

evidence came to the conclusion that 41s. per ton was the "market rate." He accordingly gave judgment for the suppliant for an amount to be based on the difference between 28s. and 41s.]

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Judgment for the suppliant.

Solicitors for the suppliant : *Thos. Cooper & Co.*

Solicitor for the Crown : *Treasury Solicitor.*

J. F. C.

[IN THE COURT OF CRIMINAL APPEAL.]

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THE KING *v.* THOMAS WHEAT.

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THE KING *v.* MARION STOCKS.

*Criminal Law—Bigamy—Honest Belief of former Marriage being dissolved—
Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 57.*

It is no defence in law to an indictment for bigamy that the prisoner, at the time of the alleged bigamous marriage, believed, in good faith and on reasonable grounds, that he had been divorced from the bond of his first marriage, if in fact he had not been divorced.

Reg. v. Tolson (1889) 23 Q. B. D. 168 considered.

APPEAL from convictions at Derby Assizes.

The prisoner Wheat was charged with having on July 21, 1920, married the prisoner Marion Stocks, his wife being then alive, and the prisoner Stocks was charged with aiding and abetting Wheat in the commission of that offence. Both prisoners pleaded not guilty. The evidence submitted to the jury for the defence was that Wheat's wife had committed adultery; that in 1919 Wheat was admitted as a poor person to bring divorce proceedings against his wife; that in May, 1919, solicitors were assigned to him to conduct those proceedings; that after some delay he provided the solicitors with money to meet the out-of-pocket expenses; that on April 23, 1920, the solicitors wrote: "We can now proceed with the matter, and will lose no time over your petition"; and that in reply to a telegram sent by Wheat, the terms of

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which were not in evidence, the solicitors wrote to him on July 1, 1920: "We have your telegram, and hope to send you papers for signature in the course of a day or two." Wheat gave evidence that he was a man of little education, and that on the receipt of that letter he believed that he was divorced. The jury found that the prisoners in good faith and on reasonable grounds believed that Wheat had been divorced at the time he went through the form of marriage with Stocks. On that finding it was contended for the prisoners that they were entitled to a verdict of not guilty, but Sankey J. directed the jury to return a verdict of guilty, so that the question of law arising in the case might be determined. The jury accordingly found the prisoners guilty, each of whom was then sentenced to one day's imprisonment. The prisoners appealed on Sankey J.'s certificate.

W. Norman Birkett for the appellants. Upon the true construction of s. 57 of the Offences against the Person Act, 1861 (1), a belief in good faith and on reasonable grounds that the prisoner has been divorced from the bond of the first marriage, constitutes a complete answer to a charge of bigamy. It is a general principle of our law that there must be, as an essential ingredient in a criminal offence, some blameworthy condition of mind: per Cave J. in *Chisholm v. Doulton* (2); per Wright J. in *Sherras v. De Rutzen* (3), although it is true, as was pointed out by Wright J. in the same case, that this general presumption is liable to be displaced either by the words of the statute creating the offence, or by the subject-matter with which it deals. *Reg. v. Prince* (4) is an instance

(1) Offences against the Person Act, 1861, s. 57: "Whosoever, being married, shall marry any other person during the life of the former husband or wife, . . . shall be guilty of felony. . . . Provided, that nothing in this section contained shall extend . . . to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of

seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage. . . ."

(2) (1889) 22 Q. B. D. 736, 741.

(3) [1895] 1 Q. B. 918, 921.

(4) (1875) L. R. 2 C. C. 154.

of a statute being absolutely prohibitory. In *Rex v. Lolley* (1), which was decided on 1 Jac. 1, c. 11, it was held that to an indictment for bigamy it was not a valid defence to prove a divorce out of England before the second marriage, founded on grounds on which a marriage could not be dissolved in England. As Lord Brougham, referring to *Rex v. Lolley* (1), said in *M'Carthy v. De Caix* (2) "the statute of James I. does not make any difference whether a man acts with an innocent ignorance, or a guilty knowledge, and says, if A.B. shall marry C.D., when his former wife, E.F., is alive, he is guilty of felony." *Rex v. Lolley* (1) has, however, no application in view of the decision in *Reg. v. Tolson*. (3) There a woman who had gone through the ceremony of marriage within seven years after she had been deserted by her husband was convicted of bigamy. The jury found that at the time of the second marriage she in good faith and on reasonable grounds believed her husband to be dead. It was held by the majority of the Court for Crown Cases Reserved that this finding afforded a good defence to the indictment; and, accordingly, the conviction was quashed. The observations of Cave J. in that case (4) are directly in point: "At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim 'actus non facit reum, nisi mens sit rea.' Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy." That decision shows that to constitute the offence of bigamy there must be a blameworthy mind, a condition which is expressly negatived by the jury's finding in the present case: see also *Rex v. Thomson* (5) and *Rex v. Connatty*. (6) This conviction ought therefore to be quashed.

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(1) (1812) Russ. & R. 237; 2 Cl. & F. 567n.

(2) (1831) 2 Cl. & F. 568n, 569.

(3) 23 Q. B. D. 168.

(4) Ibid. 181.

(5) (1905) 70 J. P. 6.

(6) (1919) 83 J. P. 292.

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Sir Gordon Hewart A.-G. (*E. L. Hadfield* and *Roome* with him) for the Crown. The conviction was right, the finding of the jury as to the belief of the appellants being quite immaterial. *Reg. v. Tolson* (1) does not assist the appellants. There the question was whether the presumption could properly be drawn that the absent husband was dead and the decision was that it could. But while there is room for drawing the inference that a person is dead there is none for drawing an inference that a person has been divorced. A person may die at sea or in the wilds of Africa and there may be no means of establishing the fact. There may consequently be a doubt as to the fact of death, but there can be none as to the fact of divorce, which cannot happen behind a man's back, and is capable of precise ascertainment. The fallacy of the argument for the appellants lies in the assumption that for this purpose death and divorce are on the same footing. To come within the proviso to s. 57 as to divorce, it must be proved that the person indicted for bigamy has in fact obtained a divorce; a mere belief that a decree has been obtained, when in fact it has not, is no answer to an indictment for bigamy. The observations of Cave J. in *Reg. v. Tolson* (1) go beyond what was necessary for the decision. The defence set up in this case was not so much as mooted in *Rex v. Lolley* (2) where there had in fact been a divorce obtained in Scotland.

[AVORY J. In *Earl Russell's Case* (3) there had been a divorce in America, but that fact was not set up as a ground of defence to the charge of bigamy; it was merely urged in mitigation of punishment.]

As to the other cases cited, *M'Carthy v. De Caix* (4), *Rex v. Thomson* (5) and *Rex v. Connatty* (6), there is nothing to be found in them as to the application of the presumption to divorce.

If the reasoning in *Reg. v. Tolson* (1) is to be applied to divorce, there was in this case no evidence upon which the

(1) 23 Q. B. D. 168.

(2) Russ. & R. 237; 2 Cl. & F. 567n.

(3) [1901] A. C. 446.

(4) 2 Cl. & F. 568n.

(5) (1905) 70 J. P. 6.

(6) 83 J. P. 292.

jury could find that the appellants had reasonable grounds for believing that Wheat, at the time of going through the ceremony of marriage with Stocks, had been divorced from the bond of his first marriage.

Birkett in reply. There is no ground for limiting the application of *Reg. v. Tolson* (1) in the way suggested by the Crown. The principles there enunciated by the majority of the judges are of general application. This point could not have been raised till after the decision in that case, so the fact that it was not advanced in *Rex v. Lolley* (2) has no relevancy.

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Cur. adv. vult.

Feb. 14. The judgment of the Court (Bray, Avory, Shearman, Salter and Greer JJ.) was read by

AVORY J. The appellant Thomas Wheat was convicted of bigamy, and the appellant Marion Stocks of aiding and abetting in the commission of the offence. The alleged bigamous marriage between the appellants took place on July 21, 1920. The jury, in answer to a question put to them by the learned judge at the suggestion of counsel for the defence, found that the appellants in good faith and on reasonable grounds believed that the man Wheat had been divorced at the time he went through the form of marriage with Stocks on July 21. The only evidence submitted to the jury upon which the finding could be based was that the appellant Wheat's wife had committed adultery; that in 1919 he was admitted as a poor person to bring divorce proceedings against his wife; that in May, 1919, solicitors were assigned to him to conduct those proceedings; that after some delay he provided the solicitors with a sum of money to meet the out-of-pocket expenses; that on April 23, 1920, the solicitors wrote: "We can now proceed with the matter and will lose no time over your petition"; that in reply to a telegram sent by the appellant Wheat, the terms of which were not in evidence, the solicitors wrote to him on July 1, 1920: "We have your telegram and hope to send you papers

(1) 23 Q. B. D. 168.

(2) Russ. & R. 237; 2 Cl. & F. 567n.

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for signature in the course of a day or two ”; and the appellant Wheat gave evidence on oath that he was a man of little education, and that on the receipt of that letter he believed that he was divorced. The appellant Stocks did not give evidence.

Under these circumstances we are of opinion that there was no evidence upon which the jury could find that the appellants, or either of them, believed in good faith on reasonable grounds that the appellant Wheat had been divorced, and assuming that such a finding would afford any defence, the appeal would have to be dismissed on that ground alone. The learned judge however, notwithstanding that finding, directed a verdict of guilty in order that the question of law whether such a finding does afford any defence to a charge of bigamy might be determined in this Court.

Mr. Birkett for the appellants has contended that the decision in *Reg. v. Tolson* (1), in which it was held that a bona fide belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defence to the indictment, governed this case, and that it followed from that decision that a bona fide belief on reasonable grounds that the person accused had been divorced afforded a good defence.

Upon reference to the statute 24 & 25 Vict. c. 100, s. 57, we find the offence defined in these words: “Whosoever, being married, shall marry any other person during the life of the former husband or wife, . . . shall be guilty of felony.” To this absolute prohibition there are in the proviso three exceptions applicable to British subjects, (1.) when the husband or wife has been continually absent for the space of seven years then last past and has not been known by the person accused to be living within that time; (2.) when the person accused at the time of the second marriage has been divorced from the bond of the first marriage; (3.) when the former marriage of the person accused has been declared void by the sentence of any Court of competent jurisdiction. It has been decided in the case of the first exception that upon

(1) 23 Q. B. D. 168.

proof of the continuous absence for seven years the person accused is entitled to an acquittal in the absence of proof by the prosecution that the person accused knew that the wife or husband, as the case may be, was living within that time, and as the Attorney-General has pointed out in his argument for the Crown this exception creates or involves a presumption of death, which, unless rebutted by the prosecution, entitles the accused to an acquittal; in other words the person accused is presumed to believe under such circumstances that the former wife or husband is dead at the time of the second marriage, and therefore has no intention of doing the act forbidden by the statute—namely, marrying during the life of the former husband or wife. In the case of the second exception there is no indication in the statute that any presumption or belief is to afford any defence; the words do not admit of any such qualification and the only defence under this head appears to be that the accused has in fact been divorced from the bond of the first marriage. If he has not, then at the time of the second marriage he is a person who, being married, intends to do the act forbidden by the statute—namely, “to marry during the life of the former wife.” Having regard to this distinction between the two exceptions, we are of opinion that a bona fide belief on reasonable grounds that the person accused has been divorced, when in fact he has not been divorced, affords no defence in law to the charge of bigamy, although it may afford good reason for the infliction of a nominal punishment, and in our opinion this decision is not in conflict with the decision of the majority of the judges in *Reg. v. Tolson* (1), but is in accord with the principle of the judgment in *Reg. v. Prince*. (2)

In *Reg. v. Tolson* (1) the person accused believed on reasonable grounds that her husband was dead; therefore she did not intend at the time of the second marriage to do the act forbidden by the statute—namely, to marry during his life, and it was said in that case that the exception in the proviso showed that mere separation for seven years has the effect which reasonable belief of death caused by other evidence

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would have at any other time : see particularly the judgment of Stephen J. (1) It is true that the judgment in *Reg. v. Tolson* (2), though influenced to a great extent by that proviso, proceeded mainly on the application of the maxim "Actus non facit reum, nisi mens sit rea"—a maxim admitted to be uncertain and often misleading in its application, but it was limited in that case to the belief in the death of the former husband, and the case now in question of a belief in a divorce having been obtained was not discussed or considered. In our opinion the maxim in its application to this statute is satisfied if the evidence establishes an intention on the part of the person accused to do the act forbidden by the statute—namely, "being married, to marry another person during the life of the former wife or husband": see the judgment of Bramwell B. in *Reg. v. Prince* (3) as to the application of this maxim, and *Bank of New South Wales v. Piper*. (4) Mr. Birkett placed great reliance on the following statement in the judgment of Cave J. in *Reg. v. Tolson* (5): "At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim 'Actus non facit reum, nisi mens sit rea.' Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy. Instances of the existence of this common law doctrine will readily occur to the mind. So far as I am aware it has never been suggested that these exceptions do not equally apply in the case of statutory offences unless they are excluded expressly or by necessary implication." If the learned judge was laying this down as a principle applicable to all statutes we do not agree with him. The principle is stated too widely. In any event it was not necessary for the decision of that case. In

(1) 23 Q. B. D. 192.

(2) *Ibid.* 168.

(3) L. R. 2 C. C. 175.

(4) [1897] A. C. 383, 390.

(5) 23 Q. B. D. 181.

Rex v. Lolley (1), where the person accused relied upon a divorce in Scotland by way of defence to a charge of bigamy under 1 Jac. 1, c. 11, which contains a similar proviso, and which was argued before all the judges by Mr. Brougham for the prisoner, it was not even suggested that a bona fide belief on reasonable grounds of the validity of the divorce would afford any defence. In *Earl Russell's Case* (2), reported fully in the *Times* newspaper of July 19, 1901, where the defendant had obtained a divorce in one of the States of America, and it was not disputed that he honestly believed the divorce was valid and that he was free to marry again, it was recognized that this was no defence in law, the divorce in fact being invalid according to English law, and the defendant was permitted to plead the circumstances in mitigation of punishment. One other case remains to be noticed which was relied on by Mr. Birkett—namely, *Rex v. Thomson* (3), in which the late Common Serjeant directed the jury that if at the time of the second marriage the prisoner bona fide believed that his first marriage was invalid on the ground that the woman he then married had a husband alive at the time he would be entitled to an acquittal. The prisoner was convicted and the question was not further discussed. It is not necessary in the present case to express an opinion on the ruling of the learned Common Serjeant, which was probably based on *Reg. v. Tolson* (4), but we doubt if it can be supported consistently with our present decision.

On both grounds therefore the appeal fails and must be dismissed.

Appeal dismissed.

Solicitor for appellants: *Registrar of Court of Criminal Appeal.*

Solicitor for Crown: *Director of Public Prosecutions.*

(1) Russ. & R. 237; 2 Cl. & F.
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(2) [1901] A. C. 446.

(3) 70 J. P. 6.

(4) 23 Q. B. D. 168.

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[IN THE COURT OF APPEAL.]

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GREAT WESTERN RAILWAY COMPANY (ON BEHALF
OF W. H. HALL, CLERK TO THE GREAT WESTERN RAIL-
WAY COMPANY) *v.* BATER (SURVEYOR OF TAXES).

*Revenue—Income Tax—Office or Employment of Profit under Public Cor-
poration—Clerk in Employment of Railway Company—Liability of
Railway Company to Assessment—Income Tax Act, 1842 (5 & 6 Vict. c. 35),
s. 146, Sch. (E)—Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, Sch. (E)—
Income Tax Act, 1860 (23 & 24 Vict. c. 14), s. 6.*

A railway company was assessed to income tax under Sch. (E) in respect of the salary of a clerk in their employment. The clerk was on the permanent staff of the company, and had been in their employ for over 20 years, and was in receipt of a salary of 130*l.* a year, plus a war bonus of 45*l.* Clerks in the company's employ received annual increments of salary up to 100*l.* a year, subsequent advances being dependent upon merit and the nature of the post occupied. The salary was paid monthly, but an interim payment on account, approximating to one-half of a month's salary, was made at the expiration of every 14 days. The employment might be terminated by either party upon a month's notice, but failing such notice the employment continued. The clerk in question was a member of the company's superannuation scheme, and on attaining the age of 60 would be entitled, if still in the service, to a pension. The company appealed against the assessment on the ground that the clerk did not hold a "public office or employment of profit" within r. 3 of Sch. (E) to s. 146 of the Income Tax Act, 1842, and that he ought to be personally assessed under Sch. (D). The Commissioners confirmed the assessment, and their decision was upheld by Rowlatt J., who, although he took the view that what was meant by the Legislature in the Act of 1842, when they spoke of an office or employment of profit, was a subsisting, permanent and substantive position which existed apart from the holder, yet he felt himself bound by what was, in substance, proceeded upon in *Attorney-General v. Lancashire and Yorkshire Ry. Co.* (1864) 2 H. & C. 792 to decide in favour of the Crown:—

Held, by the Court of Appeal, that it was impossible to lay down any general rule applicable as a test in all such cases. The question therefore was one of fact, and the finding of the Commissioners could not be disturbed.

Decision of Rowlatt J. [1920] 3 K. B. 266 affirmed.

APPEAL from a decision of Rowlatt J. (1) on a case stated under s. 59 of the Taxes Management Act, 1880, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court.

(1) [1920] 3 K. B. 266.

At a meeting of the Commissioners held on January 2, 1919, for the purpose of hearing appeals the Great Western Railway Company (on behalf of W. H. Hall), hereinafter called the appellant company, appealed against an assessment to income tax under Sch. (E) in the sum of 175*l.* for the year ending April 5, 1918, made upon them under the provisions of the Income Tax Acts in respect of an office or employment of profit held in or under the appellant company by the said W. H. Hall.

No dispute arose in the case upon the question of the amount of salary paid by the appellant company to W. H. Hall, the sole question for the determination of the Court being whether the appellant company had rightly been assessed on behalf of W. H. Hall under Sch. (E) of the Income Tax Acts.

W. H. Hall entered the service of the appellant company in the year 1897 at the age of about fourteen years as an office boy and was employed in the Divisional Superintendent's office at Swindon. In February, 1899, he was appointed a lad clerk and, in 1901, a clerk in the service of the appellant company. Mr. Hall was so appointed at an annual salary payable every twenty-eight days on the basis of 28/365ths of the annual amount, but in practice an interim payment on account approximating to one-half of a month's salary was made at the expiration of the first fourteen days of each period of twenty-eight days. There was not and never had been any written agreement as to the amount or times of payment or increase of rate of salary, but Mr. Hall had enjoyed the benefit of a practice instituted since his appointment under which the salary of a clerk was increased by annual increments of 5*l.* until a salary of 100*l.* was reached, beyond which amount advances were dependent upon merit and the nature of the post occupied. Mr. Hall's salary during the year in question was at the rate of 130*l.* per annum plus a war bonus of 45*l.* His employment might be terminated by either party upon a month's notice, and failing such notice the employment continued and would not be required to be renewed by either party. Pay was granted to Mr. Hall for each day of the year including

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C. A. holidays, and in the case of sickness he received full pay for
1921 the first twenty-eight days and five-sixths for the period of
G. W. RY. six months after the expiration of twenty-eight days. He
Co. became a member of the superannuation fund on February 13,
v. 1899, and when on July 1, 1908, the superannuation scheme
BATER. was substituted for the superannuation fund Mr. Hall con-
tinued membership of the superannuation scheme from that
date, and would on attaining the age of sixty, and being still
in the employment of the appellant company, be entitled
to a pension in accordance with r. 6, para. (b), of the
superannuation scheme of the appellant company.

On behalf of the appellant company it was contended that the intention of the Income Tax Acts as shown in the wording of the Schedule itself was to charge under Sch. (E) public offices or employments of profit and annuities, pensions or stipends payable by His Majesty or out of the public revenue of the United Kingdom, except annuities charged to the duties under Sch. (C), and that although it might be that there were words in r. 3 under Sch. (E) which might seem to include members of the staff of a railway company, the reference in that rule to offices or employments of profit held under any company must be read in the light of the words at the commencement and at the end of the rule defining its scope—namely, “all public offices and employments of profit of the description hereinafter mentioned within Great Britain . . . and every other public office or employment of profit of a public nature.” Even assuming that the principal officers of a railway company could be held to fall within the scope of Sch. (E), the junior members of the staff holding no definite appointments in the service could not be so included. In this connection reliance was placed upon the decision in *Attorney-General v. Lancashire and Yorkshire Ry. Co.* (1), and reference was made to the fact that clerks in the appellant company’s service who were engaged at weekly wages were assessed under Sch. (D), and it was contended that a clerk in the position of W. H. Hall had no more permanency of employment than officers, clerks or engine drivers engaged

at weekly wages who were assessed under the rules applicable to Sch. (D), and that the fact that he was entitled to a month's notice to terminate his employment was not sufficient ground for making any distinction between him and them. The Commissioners were asked in the above circumstances to hold that Mr. Hall was entitled to be assessed under the rules of Sch. (D) on an average of his emoluments for the past three years, and that the appellant company was not liable to be assessed under Sch. (E) in respect of his salary.

The respondent contended on behalf of the Crown (inter alia) that the appellant company was a company or society within the meaning of the Third Rule, Sch. (E), s. 146, of the Income Tax Act, 1842; that s. 6 of the Income Tax Act, 1860 (23 & 24 Vict. c. 14), expressly provides that "the Commissioners for Special Purposes shall assess the duties payable under Sch. (E) in respect of all offices and employments of profit held in or under any railway company, . . . and the said assessment shall be deemed to be and shall be an assessment upon the company"; that the case of *Attorney-General v. Lancashire and Yorkshire Ry. Co.* (1) dealt only with manual workers and gave no decision affecting clerks; that W. H. Hall held an office or employment of profit within the meaning of the above sections, and that the appellant company was therefore rightly assessed under Sch. (E).

The Third Rule of Sch. (E), s. 146, of the Income Tax Act, 1842, says: "The said duties shall be paid on all public offices and employments of profit of the description herein-after mentioned within Great Britain; (videlicet), any office belonging to either House of Parliament . . . any office or employment of profit held under any ecclesiastical body, whether aggregate or sole, or under any public corporation, or under any company or society, whether corporate or not corporate . . . and every other public office or employment of profit of a public nature."

The Commissioners who heard the appeal were of opinion

(1) 2 H. & C. 792; 33 L. J. (Ex.) 163; 10 L. T. 95.

C. A. 1921 G. W. Ry. Co. v. BATER.	that the contentions put forward on behalf of the Crown should succeed and they therefore confirmed the assessment. Rowlatt J. affirmed their decision. (1) The railway company appealed.
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Disturnal K.C. and *Geoffrey Lawrence* for the appellants. Rowlatt J. has misinterpreted the effect of Sch. (E). It applies only to offices and employments of a public nature. The first rule of that schedule clearly shows that in order to be assessable thereunder the person must be the holder of an office with definite duties attaching to it of a continuous character. The rule provides that "each assessment in respect of such offices or employments shall be in force for one whole year, and shall not be levied for such year without any new assessment, notwithstanding a change may have taken place in any such office or employment or the person for the time having or exercising the same." That makes provision for the case of a successor in the employment, and cannot apply to the case of a clerk like this.

Rule 3 begins by saying that the duties shall be paid "on all public offices and employments of profit" of the description thereafter mentioned, and then gives numerous instances of offices and employments of profit all of a public nature, and concludes "and every other public office or employment of profit of a public nature." It cannot be said that this railway clerk is the holder of an office or employment of profit of a public nature.

Schedule (D) applies to every description of employments of profit not contained in Sch. (E). It is only a question of the mode of levying the tax.

Rowlatt J. would have decided in favour of the appellants if he had not felt himself bound by what was proceeded upon by the Court in *Attorney-General v. Lancashire and Yorkshire Ry. Co.* (2) Some effect must be given to the word "public" in the schedule. The word "employment" is used in both Schs. (D) and (E). It is not therefore every employment which falls within Sch. (E).

(1) [1920] 3 K. B. 266. (2) 2 H. & C. 792; 33 L. J. (Ex.) 163; 10 L. T. 95.

The word "employment" is used throughout in conjunction with "office" and must be read ejusdem generis with its surroundings. "Office or employment of profit" means something in the nature of a permanent office or employment.

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Mr. Hall cannot be bound by the practice of the railway company under which they make returns for the purposes of income tax of all their employees: *Langston v. Glasson*. (1) *Tennant v. Smith* (2), which was relied upon by Rowlatt J., might have had some bearing if it had been the case of a clerk in the bank and not the bank agent.

Sir E. Pollock S.-G. and *R. P. Hills* for the Crown. The decision of Rowlatt J. was right. Mr. Hall comes under the company's scheme of superannuation. That means that he is a permanent member of the staff. If he had been only a weekly wage earner he would have been included in a different scheme of pensions. If this appeal be allowed it will have a far-reaching effect on the system of collection at present in operation. There are two questions, first, whether Hall's position is a public office or employment of profit; and, secondly, whether it is an office or employment of profit at all. That depends upon the proper reading of r. 3 of Sch. (E). The first thing to look at is s. 6 of the Income Tax Act, 1860 (23 Vict. c. 14), which provides that the Commissioners shall assess the duties payable under Sch. (E) in respect of all offices and employments of profit held in or under any railway company. That section does not use the word "public." Then going to Sch. (E), r. 3, it is submitted that the "videlicet" in that rule introduces an interpretation clause illustrating the meaning of "all public offices and employments of profit," and then at the end of the rule there is a clause which sweeps up everything in the nature of a "public office or employment of profit": which may have been omitted. The word "public" has in fact, as suggested by Rowlatt J., now dropped out of consideration. In *Tennant v. Smith* (2) a bank manager was held to be the holder of a public office or employment of profit within

(1) [1891] 1 Q. B. 567, 571.

(2) [1892] A. C. 150.

C. A. Sch. (E), although he had no duties to perform direct to
1921 the public.

G. W. RY. *Berry v. Farrow* (1), and *Pickles v. Foster* (2), and *Fergusson*
Co. *v. Noble* (3) are cases illustrating the application of Sch. (E).

BATER. [SCRUTTON L.J. Do you say that *Attorney-General v. Lancashire and Yorkshire Ry. Co.* (4) was rightly decided ?]

Yes.

[SCRUTTON L.J. Then it is not every employee of a company who comes within Sch. (E) ?]

No.

[SCRUTTON L.J. Then where do you draw the line ?]
Employees at weekly wages are not included.

[SCRUTTON L.J. Why ?]

It is not necessary, in order to come within Sch. (E), that the holder of an office or employment of profit under a railway company should have duties to perform to the public. Hall is on the permanent staff of the company, he holds an office or employment of profit under a public corporation, and, therefore, comes under Sch. (E), and, in accordance with s. 6 of the Income Tax Act, 1860, the assessment in respect of his salary is rightly made upon the railway company.

Geoffrey Lawrence in reply. Permanence of employment cannot be the test. Engine drivers and porters are on the same footing, as regards permanence, as this man. Nor can his relation to the superannuation scheme affect the question. The test as to weekly wages equally fails. Where there is a settled establishment no doubt there is an "office." The only test applicable is whether there is an office having a separate existence and continuity apart from the holder of it. There is nothing of the kind in this case.

LORD STERNDALÉ M.R. This case like many others under the Revenue Acts is difficult, because of the general phrasing of the provisions with which we have to deal. What we have to consider is r. 3 of Sch. (E) to s. 146 of the Income

(1) [1914] 1 K. B. 632.

(2) [1913] 1 K. B. 174.

(3) (1919) 7 Tax Cas. 176.

(4) 2 H. & C. 792; 33 L. J. (Ex.)

163; 10 L. T. 95.

Tax Act of 1842, which provides: "The said duties shall be paid on all public offices and employments of profit of the description hereinafter mentioned within Great Britain; (videlicet) any office belonging to either House of Parliament, or to any Court of Justice, whether of law or equity, in England or Scotland, Wales, the Duchy of Lancaster, the Duchy of Cornwall, or any criminal or justiciary or ecclesiastical Court, or Court of Admiralty or Commissary Court, or Court-martial; any public office held under the civil government of Her Majesty, or in any County Palatine, or the Duchy of Cornwall; any commissioned officer serving on the staff or belonging to Her Majesty's Army, in any regiment of artillery, cavalry, infantry, royal marines, royal garrison battalions, or corps of engineers or royal artificers; any officer in the navy, or in the militia or volunteers; any office or employment of profit held under any ecclesiastical body, whether aggregate or sole, or under any public corporation, or under any company or society, whether corporate or not corporate, any office or employment of profit under any public institution, or on any public foundation, of whatever nature or for whatever purpose the same may be established; any office or employment of profit in any county, riding, or division, shire or stewardry, or in any city, borough, town corporate, or place; . . . and every other public office or employment of profit of a public nature."

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It would seem at first sight that the word "public" is running throughout that rule, but in the judgment of Rowlatt J. he says that the word "public" has dropped out in the course of years. I cannot agree with that, but I think what is true is, that the word "public" has been interpreted in a very much more liberal sense than at first would seem to be its meaning. On this I may specially refer to *Berry v. Farrow* (1), before Bankes L.J. sitting as a judge of first instance, where, although the matter was not before him absolutely for decision, that learned judge expressed the opinion that the managing director of a firm called Berry's Non-skid Motor Co., Ltd., which carried on no business, and at the offices of

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which he only attended on very few occasions, was taxable under Sch. (E), and therefore if the word "public" is still applicable it is obvious that it has received a very wide interpretation indeed. The words with which we have to deal here are "any office or employment of profit held under any public corporation or under any company or society whether corporate or not corporate." What we have to consider is the case of a clerk in the employment of the Great Western Railway Company. I should think that at the time this Act was passed, in 1842, there were not a great many companies in existence, and most of them were statutory or chartered companies of considerable public importance. To-day there are, of course, numberless companies, and, therefore, the question has become much more important, when it arises, as to the meaning of the words I have read: "office or employment of profit held under any company or society whether corporate or not corporate." Whether it would be better in these days, when there are so many persons in the employment of companies, for the Legislature to define more clearly what is intended by "office or employment of profit under a company" is a matter for Parliament to consider. I can only say, as it stands, it seems to me a problem of the most extraordinary difficulty to say what was really meant by the words; and, where a question of taxation arises, the subject should be able to know clearly whether he is taxable or not. The position of the person in respect of whom the assessment was made is stated in the case. [The Master of the Rolls then referred to the facts as stated in the case and continued:] It was contended on behalf of the appellants that Mr. Hall does not hold an office or employment of profit under the company which can be taxed under this schedule, because in the first place it is not a public office or employment. As I have said it seems to me, in the case to which I have just referred, that the word "public" has been interpreted in such a wide sense that it is not possible to accept that argument as a matter of law. The test which was most relied upon is this: it is said there must be an office or an employment apart from the officer or the employee, in this

sense, that if the officer or the employee dies, or goes away or leaves the employment, the office remains, and it must be something that has to be filled up, and in that sense therefore there must be continuity. It certainly is an attractive argument, but when one considers the test it seems almost impossible to give it a universal application. It is difficult to say, when you have an establishment of clerks, although the establishment may be subject to alteration from time to time, that when anybody dies or leaves there is not a vacant clerkship : it may be that the number may be altered from time to time, but until it is altered there is a vacancy in a clerkship. Of course that applies more to cases where the establishment is limited by either a Treasury minute, or a minute of a Government department, or the resolution of a company in general meeting, or something of that description ; but that does not seem to be a test which you can possibly apply to every kind of office or employment : it does not seem to me to be disputed that the post of a manager or an assistant-manager would be an office or employment under this section, but it is always open and perfectly competent to the company—it is not practically competent to a railway company—but it is always competent, as a matter of power, to an ordinary company, to abolish its managership or assistant-managership, or to say “ We will go on with a manager without an assistant manager ” ; then the assistant-managership does not remain by itself as a separate entity, there is no such thing. I cannot see how that can be applied as a conclusive test in all cases : nor do I see how any of the tests contended for by the Crown can be regarded as absolute tests in all cases. It is said that the employee must be on the permanent staff. Well that does not mean, of course, that he cannot be got rid of, but it means that he must be on the permanent establishment, as contrasted with the temporary staff taken on from time to time. I do not think that could be applied in every case. It is also said he is on the salaried staff, and not on the wage-earning staff. I do not think that can be applied as a test in all cases, nor do I think that the exact nature of the work can be a test. Although we are not told exactly the nature of this clerk's

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C. A. work, we must take it that it is ordinary clerk's work, and
 1921 it is not disputed that some of the employees of the railway
 G. W. RY. company come within this provision; on the other hand I
 Co. do not think it is disputed, and in fact, since *Attorney-General*
 v. *BATER.* *Lancashire and Yorkshire Ry. Co.* (1), it cannot be
 Lord Sterndale M.R. disputed, until that case is overruled, that many of the
 employees of the railway company do not come within this
 provision, such as engine drivers, porters, and so on. But
 neither the railway company nor the Crown has been able to
 suggest any fixed point at which the line is to be drawn,
 except the one that has been suggested by the railway company,
 that a man must be holding an office or a position which
 remains an office or a position, although the particular holder
 for the time has gone. That, as I have said, I do not think
 can be applied to all cases. It comes back, as it seems to me,
 to the somewhat unsatisfactory and inconclusive result that
 one has to arrive at in all these cases, where there is no distinct
 line on one side or the other of which it is possible to say
 exactly a particular case falls. The matter has to be decided
 upon the inference to be drawn from a considerable number
 of circumstances, in fact it comes to be a question of fact.
 That is an unsatisfactory conclusion, because I should desire
 if possible to lay down some rule which would be a guide in
 the division of this staff into persons who are taxable and
 those who are non-taxable under Sch. (E), but I do not think it
 possible to do so.

The Commissioners having the contentions of both parties
 before them, that on the part of the Crown being that W. H. Hall
 holds an office or employment of profit within the meaning of
 the rule, have stated that they are of opinion that the con-
 tention of the Crown should succeed. That amounts to
 a finding of fact that this man was such an officer as the
 Crown contends, and I cannot say there was no evidence
 on which the Commissioners could possibly come to that
 conclusion, and, unless I can say that, I cannot interfere
 with their decision. It is unsatisfactory that the Court finds
 itself unable to lay down any guiding rule which would

(1) 2 H. & C. 792; 33 L. J. (Ex.) 163; 10 L. T. 95.

avoid questions of this description coming before the Commissioners again. I have tried very hard but find myself unable to do so. I therefore come to the conclusion that I cannot dispute the finding of the Commissioners, and the appeal must be dismissed with costs.

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SCRUTTON L.J. I agree that this is a difficult case, and that our decision is not very satisfactory even to ourselves. That results from the fact that the Income Tax Acts are being worked under a system of considerable antiquity, which in many respects has not been amended by Parliament. All employees whose income reaches a certain amount, which has varied from time to time, are taxable either under Sch. (E) or Sch. (D). Whether they come under one schedule or the other has certain consequences which I do not profess to enumerate exhaustively, but some of them are: if they come under Sch. (E) they are taxed on the income of the year of assessment, and if they come under Sch. (D) they are taxed on the average of the preceding three years' income, if there is such an average; and if they come under Sch. (D) they are assessed directly, and must fight out their battles with the income tax authorities by themselves; but if they come under Sch. (E) they are assessed through their employer who has to pay to the income tax authorities, and then deduct the tax from the employee. Naturally under those circumstances it may make a difference to a man whether he is taxed under Sch. (D) or under Sch. (E).

Schedule (E) itself taxes public offices or employments of profit. I do not know whether, looking at it by the light of nature, you would ever say that a Fourth-Class Clerk in the Running Department of the Great Western held a public office or employment of profit. But Parliament has not stopped there, because it has interpreted the schedule by rules, and r. 3 of Sch. (E) provides: "the said duties shall be paid on all offices and employments of profit of the description hereinafter mentioned . . . and every other public office or employment of profit of a public nature." That appears to amount to a statutory declaration that at any rate some

C. A. of the people employed by the persons "hereinafter mentioned" do hold public offices and employments of profit.
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G. W. RY. When you consider the long list of persons "hereinafter mentioned," after passing through a number of what are
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 BATER. clearly public offices, Courts of Justice, the Army, the Duchy
 Scrutton L.J. of Cornwall and so on, you come to "any office or employment of profit held under any ecclesiastical body, whether aggregate or sole, or under any public corporation or under any company or society, whether corporate or not corporate," and that seems to me clearly to amount to a statutory declaration that companies may have persons employed under them who hold public offices or employments of profit. It also seems to be quite clear from s. 6 of the Act of 1860 that the Legislature thought that railway companies might have people under them who held offices and employments of profit, who were to be assessed under Sch. (E). In 1842, when this rule was drawn up, as far as I know, there was not any Companies Act, and there were no limited companies, but there were certain statutory companies, established by statute, such as railway companies—probably the Great Western was one of them—and there were certain corporations of great antiquity and dignity, established under charter, such as the Hudson's Bay Company, service in which was a kind of aristocracy of employment with old traditions going back to the time of the Stuarts; and what has happened is that, on a rule drawn up at that time when companies were very few, and very large, and very important, there has grown up a system under which any number of companies, for all kinds of small purposes, have come into existence, and the puzzle is to apply the Third Rule of Sch. (E) to the new state of things. One has had already, in the last two or three years, to comment on the fact that under an Act drawn up when there were practically no companies in existence it has been necessary to consider all sorts of problems about a great mass of companies which were not contemplated when this Act was drawn, and this is one of the difficult cases.

We have the guidance of one decision, *Attorney-General v.*

Lancashire and Yorkshire Ry. Co. (1), which, as far as I gather, neither party to this litigation has sought to object to or to say it was wrongly decided, a case in which the question of employees of the Lancashire and Yorkshire Railway Company came before the Court in 1864, where the Court held that employees at weekly wages who might be described as workmen and artisans, such as engine drivers and porters, did not come within Sch. (E). There Baron Martin said (2): "We think Schedule (E) extends only to offices or employment under corporations which are of a public nature, and not to workmen or artisans like engine-drivers, porters and labourers." That appears to decide that not every person employed by a company comes under Sch. (E). But when you ask why not, I am afraid you do not get very much light as to what is the boundary line between those employees who do and those who do not come under Sch. (E). "Workmen or artisans like engine-drivers, porters and labourers" rather suggests that it has something to do with the importance or dignity of the work done for the company, at a time when it was not thought very dignified to be doing manual labour, an idea which is perhaps not so strongly held as it used to be. Something, again, was made of the time at which the salary is paid, whether weekly or annually. Again that seems rather to point to a question of the degree of the importance of the position held under the company. Something is also made of the question whether there is an office, which may be said to be vacant until some one is placed in it. Again that seems to be very much a question of degree.

In this case the Commissioners, having considered the position of the gentleman in question, find that he is one of the salaried staff of the company, his salary being paid monthly, with an advance fortnightly, that he has rights under a pension fund, and that he has to a certain extent a permanent position; and on that they have said "We find that he does hold an office or employment of profit under a company." Now can this Court possibly say that there is no evidence upon which they could say that? Before the Court

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. (1) 2 H. & C. 792; 33 L. J. (Ex.) 163; 10 L. T. 95.

(2) Ibid. 811.

C. A. could say that, it would have to lay down a clear definition
1921 of the characteristics necessary to constitute an office or
G. W. RY. employment of profit, a task which I personally find utterly
Co. beyond me. Can I possibly say, under these circumstances,
v. that the Commissioners were wrong in deciding that this
BATER. gentleman did hold an office or employment of profit under a
Scrutton L.J. company? In my view I cannot possibly say that he does
not—I cannot possibly say that there is no evidence upon
which they could find that he does. I do not profess for a
moment that this will be satisfactory to the parties who have
come to this Court. I do not suppose that it will afford any
guide to the Commissioners, though it may afford them some
sense of security in future appeals. All I can say is, it is very
desirable that Parliament should interpret the meaning,
having regard to the present state of companies, of this
schedule. I observe that the Commission which has reported
on suggested amendments of the Income Tax Acts has
advised that every employee be put under Sch. (E), assessed
on the year's income, and have his tax levied through his
employer. That is a matter for Parliament and not for this
Court. If that amendment were adopted it would do away
with difficulties such as have arisen in this case. But it
is not for this Court to express any opinion whether that
amendment should or should not be adopted. All that we
can say is, that on this appeal we cannot see that, as a matter
of law, the Commissioners have gone wrong. On the facts
it is for the Commissioners alone to decide, and, if they have
not gone wrong in law, it is not for this Court to express
any opinion.

YOUNGER L.J. I also can arrive at no other conclusion
than that which has been stated by my Lord and the Lord
Justice, and I agree that this appeal must be dismissed
with costs.

Appeal dismissed.

Solicitor for the appellants : *A. G. Hubbard.*

Solicitor for the Crown : *Solicitor of Inland Revenue.*

G. A. S.

LEXDEN AND WINSTREE UNION, APPELLANTS v. 1921
WINDSOR UNION, RESPONDENTS. Jan. 12, 13.

Poor Law—Settlement—Illegitimate Child under Sixteen—Inquiry into derivative Settlement of Mother—Place of Child's Birth—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), ss. 34, 35.

The pauper, an illegitimate child, was born in a parish in the appellant Union in May, 1914, and was shortly afterwards taken to the house of his mother's parents in the respondent Union, where he resided until December 30, 1919, when he became chargeable to that Union. In July, 1914, the mother of the pauper went to reside in the parish of Ross, in the Ross Union, where she remained until November, 1915, when she married a man who had acquired a settlement in that parish, and who never acquired a subsequent settlement. In May, 1920, an order was made adjudging that the pauper's settlement was in the parish of his birth and ordering his removal to the appellant Union. Upon appeal to quarter sessions the order was quashed:—

Held, that inasmuch as under the third paragraph of s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876, the settlement of the pauper's mother, being derived from her husband, could not be inquired into, the pauper must be deemed to be settled in the parish in which he was born, and that the removal order was therefore properly made.

Dictum of Lord Watson (*Reigate Union v. Croydon Union* (1889) 14 App. Cas. 465, 484) that the third paragraph of s. 35 has no application to children under sixteen, disapproved and not followed.

CASE stated by the Recorder of Windsor.

This was an appeal to the Court of quarter sessions for the borough of New Windsor by the Guardians of the Lexden and Winstree Union against an order made on May 6, 1920, by two justices of the peace acting for the borough of New Windsor adjudging the place of the last legal settlement of an illegitimate child one Eric Frank Victor Williams otherwise Sherwell (hereinafter called the pauper), aged five years, then chargeable to the Guardians of the Windsor Union, to be in the parish of Wormingford in the Lexden and Winstree Union, and ordering the removal of the pauper from the Windsor Union to the Lexden and Winstree Union.

The following facts were admitted or proved at the hearing before the Recorder:—

The pauper is the illegitimate child of one Nellie Margaret Hughes (formerly Williams), and was born on May 19, 1914,

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in the parish of Wormingford in the Lexden and Winstree Union. Nellie Margaret Hughes was a spinster when the pauper was born.

Nellie Margaret Hughes about the end of July, 1914, left the parish of Wormingford where she had gone to be confined and went to reside in the parish of Ross in the Ross Union in the county of Hereford, where she remained until November 15, 1915, when she was married to one Reginald Hughes.

Reginald Hughes resided in the parish of Ross from about the year 1911 to December, 1916 (when he went with his wife to reside in another union), in such manner and under such circumstances as to acquire a settlement in the parish of Ross under the provisions of s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, and he never acquired a subsequent settlement.

On May 6, 1920, when the order of the justices the subject of the appeal was made, Nellie Margaret Hughes was last legally settled in the parish of Ross by virtue of the settlement she had derived and retained as the wife of Reginald Hughes.

On July 27, 1914, the pauper was taken by consent of his mother from the parish of Wormingford to the house of his mother's parents in the parish of New Windsor in the Windsor Union and he thenceforward resided in the parish of New Windsor, being maintained entirely by his mother's parents until December 30, 1919, when the pauper became chargeable to the Guardians of the Windsor Union who caused inquiry to be made as to his last legal settlement.

Nellie Margaret Hughes did not reside within the Windsor Union during any part of the period mentioned nor at any time and she would have been removable from that Union if she had gone to reside within it and had become chargeable at any time during the said period.

The appellants contended that the pauper was not settled in the parish of Wormingford, the place of his birth, but was settled (if and so far as it was material for them to allege a settlement) in the parish of Windsor, or alternatively, that inasmuch as he was under sixteen at the time the order of

the justices was made, the third paragraph of s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876, did not apply to him or his settlement, and that the order of the justices was bad. (1)

The respondents contended that the pauper had not acquired a settlement for himself, and that inasmuch as it appeared from the inquiry into his settlement, that his mother's settlement was derivative, being derived from her husband and retained by her, the pauper must be deemed to be settled in the parish of his birth by virtue of the third paragraph of s. 35 of the Act of 1876, and that the order of the justices was rightly made.

The attention of the Recorder was called to the judgment of Lord Watson in *Reigate Union v. Croydon Union* (2) where he said: "The provisions of the third clause have in my opinion no application to children under the age of sixteen." Attention was also called to the decision of the Court of Appeal in *West Derby Union v. Atcham Union* (3) adopting the opinion of Lord Watson. Attention was also directed to the case of *Tendring Union v. Braintree Union* (4) where the Court, without having the case of *West Derby Union v. Atcham Union* (3) brought to its notice, took the contrary view.

The Recorder was of opinion that, if it was open to him to do so, he should decide the appeal in accordance with the decision in *Tendring Union v. Braintree Union* (5), but in

(1) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

(2) 14 App. Cas. 465, 484.

(3) (1889) 24 Q. B. D. 117.

(4) [1920] 2 K. B. 647, 655.

(5) [1920] 2 K. B. 647.

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view of the judgments in the Court of Appeal in *West Derby Union v. Atcham Union* (1) he felt bound to decide in accordance with the opinion of Lord Watson, and he accordingly decided that the pauper was not legally settled in the parish of Wormingford, and allowed the appeal and quashed the order of the justices.

The question for the opinion of the Court was whether the order of the Recorder was rightly made.

Rawlinson K.C. and *Herbert Davey* for the appellants, the Windsor Union. The question is whether the order for the removal of this child to the place of its birth settlement was properly made. If the third clause of s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876, applies to a child under the age of sixteen, the order for the removal of the child was right, but in *Reigate Union v. Croydon Union* (2) Lord Watson said that the provisions of that clause of s. 35 had "no application to children under the age of sixteen." Those words, however, were unnecessary for the decision of the case then under consideration, and were therefore merely obiter. In *West Derby Union v. Atcham Union* (1) the Court of Appeal acted upon the view of s. 35 expressed by Lord Watson, but in three subsequent cases in the House of Lords that dictum has been practically overruled. In *West Ham Union v. Holbeach Union* (3) it was held that an illegitimate child under sixteen who had resided with her mother in a parish under such circumstances as would render her irremovable had acquired a settlement in that parish. In *Fulham Parish v. Woolwich Union* (4) it was decided that an illegitimate child could under s. 34 of the Act of 1876, before the age of sixteen, acquire a settlement by residence under the requisite conditions in a parish with its reputed father who was irremovable, and in *Hackney Union v. Kingston-upon-Hull Incorporation for the Poor* (5) it was held that a legitimate child could, under that section,

(1) (1889) 24 Q. B. D. 117.

(3) [1905] A. C. 450.

(2) 14 App. Cas. 465, 484.

(4) [1907] A. C. 255.

(5) [1912] A. C. 475.

before the age of sixteen, acquire a settlement by residence in a parish with its deserted mother who had become irremovable. In the recent case of *Tendring Union v. Braintree Union* (1) the dictum of Lord Watson was disapproved, and the Earl of Reading C.J. said that he did not think that the House of Lords, in the subsequent decisions, ever intended to support it. The authorities clearly show that the third paragraph of s. 35 applies to children under the age of sixteen.

Hohler K.C. and *C. E. Jones* for the respondents. The decision of the Court of Appeal in *West Derby Union v. Atcham Union* (2) is binding upon this Court. Lord Esher M.R. there pointed out that the judgment of Lord Watson in *Reigate Union v. Croydon Union* (3) must have been read by the other learned Lords, and that they did not in any way differ from it. There is nothing in the subsequent cases in the House of Lords which is really inconsistent with the view of Lord Watson. Several of those cases were decided upon s. 34 of the Act of 1876, and not upon s. 35. The opinion expressed by Lord Watson was not a mere dictum, but was a necessary part of his judgment. It has not been dissented from in the subsequent decisions in the House of Lords.

LORD COLERIDGE J. In this case we can reduce the points to which our attention has been directed to a very narrow limit. The facts are these. On March 19, 1914, an illegitimate child was born of its mother in the Lexden and Winstree Union. The child remained in the Union until July 27, 1914, when it was taken to New Windsor, where it remained in charge of its mother's parents until December 30, 1919, when it became chargeable to the Guardians of the Windsor Union who caused inquiries to be made as to the child's last legal settlement. Meanwhile the mother went to Ross, and married in 1915, and her husband, between 1911 and 1916, acquired a settlement there—that is at Ross—which he never lost, and

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(1) [1920] 2 K. B. 647.

(2) 24 Q. B. D. 117.

(3) 14 App. Cas. 465, 484.

1921 the mother thereupon acquired a derivative settlement in

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We are not called upon to inquire or decide whether the pauper has acquired a settlement by residence in New Windsor, but whether the pauper is removable to the Lexden Union as the place of its birth under the provisions of the Divided Parishes and Poor Law Amendment Act, 1876. Sects. 34 and 35 of this Act have been the subject of a considerable amount of judicial attention. Sect. 34 provides : " Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise." It is now abundantly clear that " any person " comprises a pauper, whether legitimate or illegitimate, or whether under or over the age of sixteen years. Sect. 35 provides that¹ " no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of 16, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another. An illegitimate child shall retain the settlement of its mother until such child acquires another settlement."

Then it goes on : " If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

At first sight the provisions of the section seem to be abundantly clear. This was an illegitimate child. It was under the age of sixteen. It therefore retains the settlement of the mother until such child acquires another settlement ;

and not having acquired, as we understand—it is not before us—a settlement by residence in New Windsor, the authorities there inquired into the settlement of the mother. Then, according to the third paragraph, if it cannot be shown what settlement the child derived from its mother without inquiring into the derivative settlement of such parent—and here the authorities cannot inquire into what settlement the child derived from the parent and had to inquire into the derivative settlement of the mother—then in such case the child shall be deemed to be settled in the parish in which he or she was born—that is to say, having inquired in this case as to the settlement of the mother, having discovered that the settlement of the mother was a derivative settlement from her husband, the provision of the statute would seem to be clear that in that case the child is to be deemed to be settled in the parish in which it was born—that is to say, in the Lexden Union.

The difficulty in this case has arisen through the case of *Reigate Union v. Croydon Union* (1), in which Lord Watson clearly states that in his opinion the provisions of this clause have no application to children under the age of sixteen, and the whole of the arguments which in his speech he adopted or promulgated are founded upon that assumption, and it is clear that if that assumption were unfounded, the whole of the arguments based upon it are capable of being differed from—that is to say, the whole foundation of the argument fails.

The Courts went on from 1889 down to 1905 upon that assumption, and the whole reasoning of Lord Watson's argument is based upon the theory that it was impossible for a child under sixteen to acquire any settlement by residence or otherwise—any independent settlement. In the year 1905 that assumption was disputed and set aside, because in *West Ham Union v. Holbeach Union* (2), a case in the House of Lords, it was decided that an illegitimate child under sixteen under such circumstances if it resided with its mother in the parish for three years in such manner and under such circumstances in each of those years as would in accordance

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(1) 14 App. Cas. 465, 484.

(2) [1905] A. C. 450.

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with the statutes in that behalf render it irremovable, could acquire a settlement in that parish. That certainly destroyed the basis upon which Lord Watson derived his argument and his statement in his speech.

That was followed in 1907 by the case of *Fulham Parish v. Woolwich Union* (1), which is very much on the same lines, in which it was held that "an illegitimate child can under section 34 of the Divided Parishes and Poor Law Amendment Act, 1876, before the age of 16 acquire a settlement by residence under the requisite conditions in a parish with its reputed father who is irremovable therefrom." In that case the statement of Lord Watson was brought most clearly and vitally to the attention of the House, and the House came to its decision, a decision inconsistent with the statement of Lord Watson, thereby by no means confirming, but going contrary to that statement.

That was followed by a case in 1912 of *Hackney Union v. Kingston-upon-Hull Incorporation for the Poor* (2), also a case in the House of Lords, in which again the same point arose in regard to a legitimate child; and as there is no distinction for this purpose between a legitimate and illegitimate child, it did not really carry the law any further. The headnote says that "a legitimate child can, under section 34 of the Divided Parishes and Poor Law Amendment Act, 1876, before the age of 16, acquire a settlement by residence under the requisite conditions in a parish with its deserted mother who has become irremovable therefrom." The remarks of Lord Watson were again brought most prominently before the attention of their lordships, and Lord Loreburn, then Lord Chancellor, who gave the judgment, alludes to what he describes as Lord Watson's dicta, implying that Lord Watson's remarks were not absolutely material to the decision of the House of Lords in which he was taking part, and he says: "The use that was made in argument of Lord Watson's dicta makes me disposed to be cautious in generalisations." It has been observed with force that Lord Watson's statements, which are now described as dicta, were affirmed by

(1) [1907] A. C. 255.

(2) [1912] A. C. 475.

the Court of Appeal in *West Derby Union v. Atcham Union* (1), and though the learned judges in that case could not wholeheartedly approve in the independent sense of the statements of Lord Watson, they were of opinion that they were bound by those statements, that even if they could be described as dicta his judgment must have been seen and approved by the other noble and learned Lords, and, therefore, that having regard to the fact that the House of Lords had permitted this statement to go forth as a statement of the interpretation of the statute, they were not the authority to differ from that statement.

If the matter remained there, apart from these other decisions of the supreme tribunal, our difficulties would have been greatly enhanced. The latest case was a case in the Divisional Court of *Tendring Union v. Braintree Union* (2), in which this point arose, and in which the learned judges, Lord Reading in particular, directed his attention to what I may call the view of the statement in the *Hackney Union Case* on the dicta of Lord Watson. He said: "I think that the conditions contemplated by the third paragraph of section 35 exist in this case, namely, that these illegitimate children have not acquired a settlement for themselves, and that it cannot be shown what settlement they have derived from the mother under the second paragraph without inquiring into the mother's derivative settlement from the father. Therefore the result is that they 'shall be deemed to be settled' in the parishes in which they were respectively born, neither of which is in the appellant union. Consequently they are not settled in a parish in the Tendring Union, and the Justices were wrong in holding that they were. It has been contended that so to construe the third paragraph is to adopt a construction repugnant to the first and second paragraphs. I cannot take that view. And I do not think the House of Lords ever intended to support the dictum of Lord Watson in *Reigate Union v. Croydon Union* that the third paragraph has no application to children under 16. The decisions which have been given since that

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(1) 24 Q. B. D. 117.

(2) [1920] 2 K. B. 647, 654.

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case in the *West Ham Union v. Holbeach Union* (1) and *Woolwich Union v. Fulham Union* (2) are inconsistent with that dictum. One cannot quite understand how it came to be uttered by Lord Watson, a most precise Judge, and I cannot see any ground for adopting his view. It does violence to the language of the section, and I cannot think he ever intended it."

Therefore in view of this support by a Court of co-ordinate jurisdiction to ourselves of the view expressed in the House of Lords on three separate occasions, and inconsistent with what is now pronounced to be the dictum of Lord Watson in the original case, I find myself following what I should have originally conceived to have been the plain meaning of the section, and I am happy to find it is in accordance with the present view of the law.

In these circumstances the appeal must be allowed.

AVORY J. I concur entirely with the judgment which has been delivered by my Lord, and, but for the fact that I was a party to the judgment of the Court in the case of *Tendring Union v. Braintree Union* (3), I doubt if I should have thought it necessary to add anything to that judgment. It is not disputed that the judgment of this Court in the *Tendring Union Case* governs the present case now before us, but it is said that that judgment ought not now to be acted upon, on the ground that it is inconsistent with the decision of the Court of Appeal in *West Derby Union v. Atcham Union* (4), and it is said further that the decision of the Court of Appeal was not called to the attention of the Court when we decided the *Tendring Union Case*. (3)

Speaking for myself I wish to say that although the decision of the Court of Appeal in *West Derby Union v. Atcham Union* (4) was not in fact quoted, I was aware that the dicta of Lord Watson had been adopted by the Court of Appeal, although I did not specifically refer to any decision of that Court on the subject. Now if it should appear that that

(1) [1905] A. C. 450.

(2) [1906] 2 K. B. 240.

(3) [1920] 2 K. B. 647.

(4) 24 Q. B. D. 117.

judgment of the Court of Appeal has been by subsequent decisions of the House of Lords either overruled or disapproved of, then it is clear that that decision of the Court of Appeal is no longer an authority binding upon us; we are bound by the authority of the subsequent decisions of the House of Lords. In the first place I wish to say, with all respect to what was said by Lord Esher in the Court of Appeal in *West Derby Union v. Atcham Union* (1), that in my opinion the observations of Lord Watson upon the third paragraph of s. 35 were obiter in the sense that they were not necessary for the decision of any one of the three cases which were then in debate in the House of Lords. If these three cases are looked at it will be found that the first one raised a question of whether a pauper woman retained the settlement which she had derived from her husband or whether she should go back to her maiden settlement. The second of those cases raised the question whether a period of residence prior to the age of sixteen could be added to a period of residence after the age of sixteen, so as to confer a settlement under s. 34; and the third case merely raised again a question of whether a wife retained the settlement which she had acquired from her husband. In no one of them was the construction of the third paragraph of s. 35 material for the decision, and I venture also to repeat what I said in the *Tendring Union Case* (2), that in my opinion Lord Macnaghten does not appear to have assented—I have never said that he differed or dissented, but in my opinion he did not in anything he said in the House of Lords assent to the view expressed by Lord Watson. I have during the argument called attention to the fact that in saying that in *Tendring Union v. Braintree Union* (2) what I had particularly in mind was that Lord Macnaghten stated that he agreed with what was said in the judgment of the Court of Appeal in *Highworth and Swindon Union v. Westbury-on-Severn Union* (3) as to s. 35, and that judgment, so far as it relates to the construction of s. 35 generally, is, as it appears to me,

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(1) 24 Q. B. D. 117.

(2) [1920] 2 K. B. 647.

(3) (1888) 20 Q. B. D. 597.

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inconsistent with the view expressed by Lord Watson ; but further I wish to add this : turning to the opinion of Lord Macnaghten in the House of Lords in the case of *Reigate Union v. Croydon Union* (1), I find that he says : “ I now come to the third part of the section, which certainly is not free from difficulty ”—that is, the third part of s. 35—and after reading it he says : “ This part of the section is, I think, directed to a case where it is necessary to show, and to show by inquiry, what the settlement of the child is. If the child becomes chargeable and is removable with its parent or parents, there is no need for any inquiry into the settlement of the child. There is an inquiry into the settlement of the parent, but when that is ascertained there is an end of the matter. I think that this part of the section only applies where there is an independent inquiry into the settlement of the child. In that case the section says, if you find that the settlement of the parent of the child was a derivative settlement, you are not to pursue the inquiry any further. The child is to be deemed to be settled in the place of its birth.” Now mark this—Lord Macnaghten goes on : “ I agree with what was said on this point by Mathew J. in the case of *Guardians of Hollingbourne v. Guardians of West Ham.* ” (2) Turning to that case, I find that what Mathew J. said, of which Lord Macnaghten approved, was this : “ It seems to me the latter part of section 35 is intended to apply to cases where you cannot ascertain the settlement of the children in the manner pointed out in the earlier part of the section, that is by ascertaining the settlement of the father or widowed mother. When you would have to enter upon an independent inquiry as to the derivative settlement of the parent, not for the purpose as here of finding the settlement of that parent, but in order to find the settlement of the child, this is not to be undertaken, but the birthplace of the child shall be its place of settlement.”

Nowhere either in that expression of opinion by Lord Macnaghten or in the judgment of Mathew J. is there any trace of a suggestion that the child of whom they are speaking

(1) 14 App. Cas. 465, 490.

(2) (1881) 6 Q. B. D. 580, 583.

is a child of over sixteen and not one under sixteen. Therefore it appears to me, as I have already said in the *Tendring Union Case* (1), that Lord Macnaghten was certainly not approving of the view expressed by Lord Watson that this third paragraph of s. 35 applies only to children over sixteen. It seems to me clear that in Lord Watson's view, in the year 1889, an unemancipated child—that is, a child under sixteen—could not acquire a settlement by residence. That appears to be evident from reading first of all the passage from his opinion, where he says: “so far as it concerns the settlement of lawful children the clause introduces a very important alteration of the law. It puts an end to all nice questions as to emancipation or non-emancipation, by enacting that, on attaining the age of sixteen, every child shall, without regard to its physical or mental capacity, cease to follow its parents' settlement, and become capable of acquiring a settlement in its own right.”

Obviously there the learned Lord was saying that until it attained the age of sixteen it was incapable of acquiring a settlement in its own right. Again, he says: “The clause”—that is, this third clause—“assumes that the children whose settlements are the subject of inquiry are not unemancipated, but are paupers in their own right, and capable of acquiring a settlement for themselves.” (2) Again there he is repeating the view that a pauper under sixteen is incapable of acquiring a settlement for itself. Whether the learned Lord had forgotten for the moment that a child under sixteen might acquire a settlement by apprenticeship, I do not venture to say. I do not venture to say that Lord Watson ever forgot anything, but if he was dealing, as he probably was, with the question of residence only, he undoubtedly there is expressing the view that no person under the age of sixteen can acquire a settlement for itself by residence. In other words, he held that the child mentioned in the third paragraph of s. 35 was one that could acquire a settlement, and that as a child under sixteen could not acquire a settlement by residence, therefore the paragraph

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(1) [1920] 2 K. B. 647.

(2) 14 App. Cas. 482-484.

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had no application to such a child. No doubt that view was founded upon the words which occur in the third paragraph in the case of a child which has not acquired a settlement for itself. Lord Watson no doubt interpreted that to mean that the paragraph is dealing with a child who can acquire a settlement for itself, and if in his view a child under sixteen could not acquire a settlement for itself, then it follows logically that a child under sixteen is not one within the purview of the third paragraph. I think it is clear from the subsequent cases in the House of Lords to which my Lord has called attention, and which I do not think it is necessary to refer to again, that the House of Lords in the subsequent cases have held that a child under sixteen can acquire a settlement for itself by residence. That being so, they have destroyed, as it appears to me, the very substratum of the argument upon which the view of Lord Watson was based, and at the same time they have destroyed the authority of the decision of the Court of Appeal in the case of *West Derby Union v. Atcham Union*. (1)

I have only one word to add upon the construction of the section itself. If we were free to construe this section untrammelled by the decision of any Court upon it, I should have thought that there could be no doubt as to the meaning of this third paragraph of the section. The first paragraph has dealt specifically with the case of a legitimate child under the age of sixteen; the second paragraph has dealt with an illegitimate child either under the age of sixteen or over the age of sixteen; the third paragraph commences with the words: "If any child in this section mentioned shall not have acquired a settlement for itself"—I quite understand the argument that as the first paragraph was dealing with the case of a child under sixteen that the words "any child in this section mentioned" might possibly be intended to be limited to children under sixteen, but I cannot understand the argument that because the earlier part of the section has dealt with children under sixteen that therefore the third paragraph only applies to children over sixteen.

In my view, if we were untrammelled by authority it would be clear that the third paragraph does apply to children under sixteen.

For these reasons I agree with my Lord that the decision of the justices in this case who made the original order was correct, the decision of the quarter sessions was wrong, and the appeal ought to be allowed.

SALTER J. I agree.

Appeal allowed.

Solicitor for appellants : *J. J. Chapman, for Durnford & Gale, Windsor.*

Solicitors for respondents : *Beaumont, Son & Rigden, for George E. Tompson, Colchester.*

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Landlord and Tenant—Emergency Legislation—Recovery of Possession—Alternative Accommodation—Material Date—Point of Law raised by County Court Judge—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 5, sub-s. 1 (d)—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120.

By s. 5, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, no order or judgment for the recovery of possession of any dwelling-house to which the Act applies, is to be made or given unless (clause *d*) “the dwelling-house is reasonably required by the landlord for occupation as a residence for himself, . . . and . . . the Court is satisfied that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects, is available” :—

Held, that the words “is available” there mean that the Court must be satisfied of the existence of alternative accommodation at the time of making the order or giving judgment for possession.

Neville v. Hardy [1921] 1 Ch. 404 followed.

A county court judge on taking his seat in Court announced that he had, at a recent sitting of the Court, been asked to determine the meaning of the words in the above section, and that he had held them to mean that the Court must be satisfied of the existence of alternative accommodation at the time when the notice to determine the tenancy was given. On the following day the solicitor appearing for the defendant before the same judge in an action in which the meaning of these words was material did not dispute the judge's previous ruling :—

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Held, that the point had been raised and determined by the county court judge, and that it was therefore open to the defendant to appeal from this ruling.

APPEAL from Great Grimsby County Court.

The plaintiff was the landlord of a house known as "Lyndale" at Cleethorpes, in Lincolnshire, which was held by the tenant on a yearly tenancy from August 8, 1919, at an annual rent of 26*l.* 10*s.*

On February 3, 1920, the plaintiff by her solicitor served on the defendant notice to quit and deliver up possession of the premises on August 8, 1920. The defendant remained in occupation after this notice had expired, and the plaintiff then issued a summons in the county court, claiming recovery of possession and rent up to the date of the hearing.

On the day before the hearing, which took place on September 21, 1920, the county court judge on taking his seat announced that he had, at a recent sitting of the county court of Lincolnshire held at Boston, been asked to decide the meaning of s. 5, sub-s. 1 (*d*), of the Increase of Rent and Mortgage (Restrictions) Act, 1920, under which an order for the recovery of possession may be made in certain cases "if the Court is satisfied that alternative accommodation is available"; and that he had held that these words required that the alternative accommodation should be available "at the time the notice to terminate the tenancy was given." At the hearing in the county court on September 21, 1920, evidence was given that the plaintiff required the premises for her own occupation and that alternative accommodation reasonably equivalent as regards rent and suitability in all respects was available on February 4, 1920, and was offered to the defendant.

This was disputed by the solicitor for the defendant and evidence was called to the contrary; but, having regard to the judge's statement on the previous day as to his view of the law, no argument was addressed to him as to the date at which it was necessary for the landlord to prove the existence of alternative accommodation in order to come within s. 5, sub-s. 1 (*d*), of the Act.

The county court judge ordered the defendant to deliver up possession of the premises within fourteen days. The plaintiff obtained possession on October 8, 1920, under a warrant issued under the order of the county court judge.

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The defendant appealed, the main ground of appeal being that the material date for determining the existence of alternative accommodation within s. 5, sub-s. 1 (*d*), of the Act was the date of the hearing of the summons for possession, and not the date of service of the plaintiff's notice to quit.

J. B. Matthews K.C. and *F. J. Tucker* for the defendant. The main question is as to the meaning of the words "is available" in s. 5, sub-s. 1 (*d*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. At what time must the alternative accommodation be available? We say that the answer is: "at the time when the order is made or judgment given for possession." The county court judge decided that the answer is: "at the time when notice was given determining the tenancy." He dealt with the case upon a ruling given by him on the previous day from the Bench. The solicitor appearing for the defendant did not argue the question at the trial, believing that the judge had already decided the point. The point of law was sufficiently "raised" within the meaning of s. 120 of the County Courts Act, 1888, to enable it to be submitted by the appellant here: *Abrahams v. Dimmock*. (1) In that case Phillimore L.J. said: "It is a condition precedent that the point should be raised in the county court. I put it in that form because I do not say that the plaintiff or the defendant must raise it; the point must be raised and determined by the judge."

The only distinction between this case and *Abrahams v. Dimmock* (2) is that here the county court judge made a general statement as to the law when taking his seat. The rule applies "actus curiae nemini facit injuriam"; and the defendant will not be allowed to suffer in such circumstances.

Barrington Ward K.C. and *Bernard Campion* for the plaintiff. There is a preliminary objection. The point of law

(1) [1915] 1 K. B. 662, 674.

(2) [1915] 1 K. B. 662.

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sought to be raised on this appeal as to the construction of the words "is available" in s. 5, sub-s. 1 (d), of the Act was not raised at the trial in the county court. It is a condition precedent to the right of appeal that this should have been done: County Courts Act, 1888, s. 120, and following sections; *Smith v. Baker & Sons* (1); *Wohlgemuthe v. Coste*. (2)

AVORY J. In my opinion the preliminary objection fails. I have not come to this conclusion without hesitation, because it is necessary for this Court to follow the ruling of Lord Halsbury in *Smith v. Baker* (1) that in order to justify an appeal from the county court to this Court it must appear that the question of law which forms the ground of the appeal has been raised at the trial before the county court judge. I see no difference between the terms "raised" and "taken" in this connection, and the question here is whether the point of law was raised or taken at the trial and decided by the county court judge. The facts are that the county court judge on taking his seat in Court on the day before the trial announced that he had already at a recent sitting of the Court held at Boston been asked to determine the meaning of s. 5, sub-s. 1 (d), of the Increase of Rent and Mortgage Interest (Restrictions) Act, under which an order for the recovery of possession may be made in certain cases if "the Court is satisfied that alternative accommodation . . . is available"; and that he had held those words to mean: "if the Court is satisfied that alternative accommodation was available at the time that the notice to determine the tenancy was given." In making this announcement the county court judge did not preface his remarks by saying: "I am prepared to hold," or, "my view of the law is," which might invite argument or respectful protest. He said: "I have decided as a matter of law that this is the meaning of the words." It is said that notwithstanding this announcement by the county court judge, any one wishing to raise the point on appeal should have disputed the ruling. No doubt that might have been done, and it could have been politely

(1) [1891] A. C. 325.

(2) [1899] 1 Q. B. 501.

done. Whether the abstention by the advocate precludes him from afterwards raising the point is what we have to decide. Bearing in mind the judgment of Phillimore L.J. in *Abrahams v. Dimmock* (1) and of Pickford L.J. in the same case, it appears to me that it is sufficient to show that the point of law which is the subject of appeal has been brought before the judge's mind. Whether this is effected by argument or observation of the advocate, or whether the judge's own mind originated the point, does not matter, so long as the point was before his mind in the case under appeal. If the judge says: "In all cases I have decided this question of law and my decision applies to all those cases," it seems to me unnecessary that each of the advocates in Court appearing for a tenant should say: "I intend to dispute your ruling on this point." Pickford L.J. in *Abrahams v. Dimmock* (2) says: "In these circumstances it can hardly be said that the point was not brought before the judge's mind. It was his mind that originated the point, and it was discussed and decided. That being so, it would be necessary, in order to prevent a party from taking advantage of it, to show that he had in some way abandoned or waived it, or that by his conduct he had become disentitled to rely upon it." In that case the point was discussed and decided; here it was not discussed at the trial, and the judge only originated the point in the sense that he announced that he had already decided it. But it seems to me that for this purpose it was sufficiently before his mind.

SALTER J. I agree. I understand that on the day before the trial the county court judge made a general announcement as to this question of alternative accommodation, stating that he had come to a final conclusion as to the meaning of s. 5, sub-s. 1 (*d*), of the Act, and that he had acted upon it and should continue to do so. It was an intimation that he did not wish to hear argument upon it. It might have been better if the solicitor appearing for the tenant had protected himself by raising the point, but I think the objection

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(1) [1915] 1 K. B. 662.

(2) [1915] 1 K. B. 662, 679.

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is not valid, because the point of law was in fact raised and determined by the county court judge. The preliminary objection fails.

The appeal was then heard.

J. B. Matthews K.C. and *F. J. Tucker* for the defendant. The words "is available" in s. 5, sub-s. 1 (*d*), may refer either (1.) to the time when the notice determining the tenancy is given, or (2.) to the time when the writ or plaint claiming possession is issued, or (3.) to the date of the hearing. The county court judge took the first view, which is the least likely. The second view is possible, but I suggest that the third view is correct and that the words refer to the day on which judgment is given. This is the view taken by Peterson J. of the words "is required" on the first line of the same sub-section: *Nevile v. Hardy*. (1) If that judgment is correct, the words in the latter part of the sub-section must bear the same construction.

Barrington-Ward K.C. and *Bernard Campion* for the plaintiff. Assuming that the construction of the county court judge is wrong, the case should at all events be sent back for a new trial, so that further evidence may be called. The hearing should be de novo in accordance with the ruling of this Court. We admit that the crucial date cannot be the date of service of the notice, it is the date of its expiry. In *Nevile v. Hardy* (1) the learned judge appears to have regarded the whole period between issue of plaint or expiry of notice and the day of the hearing as material in considering the question of alternative accommodation for the purpose of the section. This is the correct view; otherwise the tenant might refuse all offers of alternative accommodation and thus avoid an order for ejectment, by showing that no alternative accommodation was available at the date of the hearing. The words "is available" mean "available at any material time." No one date can be taken per se. There must be alternative accommodation at some time between expiry of notice and the day of hearing, and there is evidence that such existed in the present case.

F. J. Tucker in reply. The material date for this purpose is the day of the hearing. There is no hardship on the landlord in this, because by s. 5, sub-s. 2, the Court may "adjourn the application, or stay or suspend execution on any such order or judgment, or postpone the date of possession," subject to conditions, and if the conditions are complied with the Court may discharge the order. Under the Act of 1919 it was not essential to prove alternative accommodation on the day when the case was decided; the judge had simply to consider whether it was reasonable to make the order and whether the tenant had tried to get alternative accommodation: *Smith v. Bridgen*. (1) Under the present statute this consideration is immaterial. The existence of alternative accommodation sufficient to satisfy the statute must be proved by the landlord and it must be available when the case comes for decision.

[*Harcourt v. Low* (2) and *Artizans, Labourers and General Dwellings Co. v. Whitaker* (3) were also referred to.]

AVORY J. This is an action brought in the county court to recover possession of a house at Cleethorpes, in Lincolnshire, held by the defendant upon a yearly tenancy, which had been determined by notice to quit. On the day prior to the action coming on for hearing the county court judge had announced that he had already determined the question as to the meaning of the words "is available" in s. 5, sub-s. 1 (*d*), of the Act—namely, that those words meant that the accommodation was available when the notice determining the tenancy was given. He determined it in accordance with that view of the law which he had expressed. Taking the most favourable view of the evidence, the only evidence sufficient to satisfy the statute was that alternative accommodation was available when notice was served on the defendant. Upon that evidence the county court judge made an order giving the plaintiff possession of the premises. We have to determine for the

(1) [1920] W. N. 106.

35 Times L. R. 255.

(2) [1919] Current Digest, 149;

(3) [1919] 2 K. B. 301.

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v.	modation is available" in s. 5, sub-s. 1 (d), of the
MARKHAM.	Act. In order to determine the proper construction of
Avory J.	those words, regard must be had to the opening words
	of the section, which are: "No order or judgment for
	the recovery of possession of any dwelling house to which
	this Act applies, or for the ejection of a tenant therefrom,
	shall be made or given, unless"; and then follow the
	clauses (a) to (g) stating the particular cases in which
	such an order or judgment may be made or given. It
	appears plain to me that, on the ordinary grammatical
	construction of the words, the Court must be satisfied
	of the existence of alternative accommodation at the time
	of making the order or giving judgment for possession.
	There are no doubt inconveniences from so holding, which
	have been ably pointed out to us by counsel for the plaintiff.
	For upon that construction the landlord may, in the case
	of a yearly tenancy, have given a valid notice to quit six
	months ago or more; and he may either then or subsequently
	have furnished particulars to the tenant of other available
	accommodation, which is equivalent as regards rent and
	suitability in all respects, and the tenant may have obstinately
	refused to avail himself of it. He may have waited until
	the actual trial and then have said to the county court judge:
	"It is true that I have had opportunities during the currency
	of the notice, and even since, but I have not chosen to avail
	myself of it; now all these rooms have been let, and therefore
	no alternative accommodation is now available." On the
	other hand this section has to be construed with reference
	to weekly tenancies as well as to tenancies of longer duration;
	and if the section were to be construed in accordance with the
	views of the county court judge or of counsel for the plaintiff,
	it is probable that a tenant, who was under a week's notice
	to leave and was told that there was other accommodation
	available, would have no opportunity of availing himself of
	it before the expiration of the notice or the hearing of an
	action for possession. Therefore the argument is not all in

one direction so far as expediency is concerned. Unless the effect is so contrary to the object of the Act as to defeat it, there is no justification for construing the words otherwise than in accordance with their plain grammatical sense.

The county court judge is clearly wrong in his construction of the words, and I cannot adopt the alternative suggestion made by counsel for the plaintiff. I hold that the words "is available" mean "at the time the order is made or the judgment given." There is certainly authority to support this view, and it is difficult to see why the word "is" in the first line of s. 5, sub-s. 1 (*d*), should be construed differently to "is" in the last line. In *Nevile v. Hardy* (1) Peterson J. held that the words "is reasonably required" in the first line mean "at the time the order is made or the judgment given." I agree with this construction, and I see no reason for holding that the word "is" in the last line should be differently construed. The cases of *Harcourt v. Low* (2) and *Artizans, Labourers and General Dwellings Co. v. Whitaker* (3), decided under the corresponding section of the earlier Act, support the view that the section must be considered when the order is asked for at the hearing as distinct from the date of the writ. The appeal must be allowed and the order of the county court judge set aside. There is no need to send the case back for a new trial. The defendant was evicted under the order and is not now in occupation. If he seeks to regain possession the landlord still has any remedy open to him in law.

SALTER J. I am of the same opinion. The point is one of general importance, and I propose therefore to add my judgment to that already given. The statute in question is a temporary Act passed in order to meet the need created by the shortage of dwelling houses. It modifies the rights of landlords and tenants, and of mortgagors and mortgagees, in the case of small houses. Sect. 5 is aimed at reduction of the hardship created by the unrestricted exercise of the landlord's rights in such cases, and sub-s. 1 (*d*) provides that

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(1) [1921] 1 Ch. 404.

35 Times L. R. 255.

(2) [1919] Current Digest 149 ;

(3) [1919] 2 K. B. 301.

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an order is not to be made unless it is shown that "the dwelling house is reasonably required by the landlord for occupation as a residence for himself and the Court is satisfied that alternative accommodation reasonably equivalent as regards rent and suitability in all respects is available." In *Nevile v. Hardy* (1) Peterson J. construed the words "the dwelling house is reasonably required by the landlord" in the opening words of the same sub-section as meaning "required at the time of the hearing," and I think that the words "is available" must be construed in the same way.

Unless the landlord can show that alternative accommodation is available at the time of the hearing, the Court cannot make an order for possession. There is nothing to be said in favour of the view taken by the county court judge. The view put forward by counsel for the plaintiff that the words mean "at any time between the expiration of the notice to quit and the hearing" is more plausible. But that cannot prevail in the face of the express words of the statute. The tenant, as the statute says in effect, is not to be turned out unless there is some place to which he can go. The appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Peacock & Goddard, for H. T. Kearsey, Grimsby.*

Solicitors for respondent: *C. J. Smith & Hudson, for Walter West, Grimsby.*

(1) [1921] 1 Ch. 404.

[IN THE COURT OF APPEAL.]

In re A DEBTOR.

[No. 206 OF 1920.]

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Oct. 29;
Dec. 3.

Bankruptcy—Act of Bankruptcy—Non-compliance with Bankruptcy Notice—Judgment against “Officer of H. M. forces”—Stay of Execution under Courts (Emergency Powers) Act—Effect of Demobilization—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 1, sub-s. (g)—Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), s. 1, sub-s. 1—Courts (Emergency Powers) Act, 1917 (7 & 8 Geo. 5, c. 25), s. 8—War Emergency Laws (Continuance) Act, 1920 (10 Geo. 5, c. 5), s. 1, Sch. I.

A person holding a temporary commission in the Royal Naval Volunteer Reserve, who has been demobilized, but not discharged from, nor gazetted out of the service, has ceased to be an “officer of His Majesty’s Forces” within s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1914, as amended by s. 8 of the Courts (Emergency Powers) Act, 1917, and is therefore no longer entitled to the protection against the Bankruptcy laws afforded by those statutes.

In re A Debtor [1919] 1 K. B. 169 applied.

APPEAL from a receiving order made by the Registrar in Bankruptcy.

On April 12, 1918, the debtor borrowed the sum of 100*l.* from the petitioning creditor.

On July 4, 1918, he obtained a temporary commission as a lieutenant in the Royal Naval Volunteer Reserve. In October, 1918, he was served with a writ for the recovery of the debt as he was going on board his ship, which was about to sail for Constantinople.

On November 20, 1918, the creditor obtained judgment for debt and costs against the debtor in default of appearance, but no leave to proceed upon the judgment was obtained or applied for.

On July 3, 1919, the debtor was demobilized, but he had never been gazetted out of, nor discharged from the service.

On March 5, 1920, a bankruptcy notice was served upon him, with which he did not comply.

On March 16, a bankruptcy petition was presented against him upon which the receiving order appealed from was made.

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The question arising upon the appeal was whether the debtor on his demobilization had ceased to be an "officer of His Majesty's Forces" so as to be deprived of the protection against bankruptcy proceedings afforded to officers of His Majesty's Forces by the Courts (Emergency Powers) Acts. (1)

The certificate of demobilization issued by the Admiralty to the debtor was in the following form: "This is to certify that Temporary Lieut. ——— will be demobilized from H.M.'s Naval Service with effect from July 3, 1919, on and after which date he will not be entitled to draw pay except in respect of leave due. He will be entitled to wear uniform for one month from the above date and upon occasions authorized by the Regulations. Any gratuity to which he

(1) The Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), s. 1, provides:—" (1.) From and after the passing of this Act no person shall—(a) proceed to execution on, or otherwise to the enforcement of, any judgment or order of any Court (whether entered or made before or after the passing of this Act) for the payment or recovery of a sum of money to which this subsection applies, except after such application to such court and such notice as may be provided for by rules or directions under this Act. . . . This subsection shall not apply to any sum of money (other than rent not being rent at or exceeding fifty pounds per annum) due and payable in pursuance of a contract made after the beginning of the fourth day of August, nineteen hundred and fourteen "

The Courts (Emergency Powers) (Amendment) Act, 1916 (6 & 7 Geo. 5, c. 13), s. 1 provides: "The Courts (Emergency Powers) Act, 1914 shall have effect in favour of officers and men of His Majesty's Forces, with the following modifications, that is to say:—

(a) Sub-section (1) of section 1 shall apply to any sum of money due and

payable in pursuance of a contract made before the commencement of this Act, whether such contract was made before or after the beginning of the fourth day of August nineteen hundred and fourteen "

The Courts (Emergency Powers) Act, 1917 (7 & 8 Geo. 5, c. 25), s. 8, provides:—"The Courts (Emergency Powers) Act, 1914, shall have effect in favour of officers and men of His Majesty's Forces with the following modification (that is to say)—sub-section 1 of section 1 shall apply to any sum of money due and payable in pursuance of a contract made before the officer or man has joined His Majesty's Forces."

By the War Emergency Laws (Continuance) Act, 1920 (10 Geo. 5, c. 5), s. 1, the Act of 1916 as amended by s. 8 of the Act of 1917 was extended "and to be deemed always to have extended so as to have effect in favour of persons who, having served as officers or men in any of His Majesty's Forces during the present war, have ceased to be members of those forces for a period of six months after the date when they so ceased, but in no case beyond the expiration of twelve months after the termination of the present war."

may be entitled is not issuable until full pay has actually ceased."

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On June 1, 1920, the Secretary of the Admiralty wrote, in answer to an enquiry by the debtor's solicitors, as follows : "The legal position of R.N.V.R. officers is governed by the Naval Forces Act of 1903, and the Royal Naval Volunteer Reserve Act of 1917, under which latter Act such officers are liable to render five years actual service from the date of being called into service. Officers who held temporary commissions during the war, and have been demobilized, will retain their Commissions until the date fixed by Statute for the termination of the war, from which date all temporary Commissions will cease. For all practical purposes, however, these officers are regarded as having severed their connection with the Naval Service on demobilization."

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An affidavit made by one of the Principal Clerks in the Secretary's Department of the Lords Commissioners of the Admiralty stated that the debtor's position in the Royal Naval Volunteer Reserve was governed by the Naval Forces Act, 1903, and the Royal Naval Volunteer Reserve Act, 1917. Under the Act of 1903, the debtor was liable to serve for a period of three years from the date when he was called into the service. The term of service was, by the Act of 1917, extended to five years from the date of joining the service. The debtor was demobilized on July 3, 1919, but his commission in the Royal Naval Volunteer Reserve would continue until the date fixed by statute for the termination of the war, or until such time as he might be discharged by any Act of Parliament, Proclamation or Naval order. In pursuance of the Royal Naval Volunteer Reserve Act, 1917, a proclamation was, on July 17, 1917, made, extending the term of three years as provided by the Act of 1917.

Clayton K.C. and *Kingham* for the appellant. On demobilization the debtor did not cease to be an officer of His Majesty's Forces. He was still therefore entitled to the protection of the Courts (Emergency Powers) Acts, and, no leave having been obtained to proceed upon the judgment,

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1920 and no act of bankruptcy has been committed by the debtor
A DEBTOR, upon which a bankruptcy petition could be presented. The
In re. receiving order was, therefore, wrongly made by the Registrar,
Bankruptcy Act, 1914, s. 1, sub-s. 1 (g). It has been held
that if execution cannot be issued except by leave, and no
leave has been obtained, execution is "stayed" within that
sub-section.

This case comes within s. 8 of the Courts (Emergency Powers) Act of 1917, the contract in respect of which the debtor was sued having been made before he joined His Majesty's Forces; and by the War Emergency Laws (Continuance) Act, 1920, the Act of 1916 as amended by s. 8 of the Act of 1917, was extended in favour of persons who having served as officers or men in any of His Majesty's Forces have ceased to be members of those forces for six months after the date when they so ceased.

At the material time in this case the debtor had not ceased to be an officer of His Majesty's Forces. He had been demobilized, but he had not retired nor had he been discharged from, nor gazetted out of the service. A demobilized officer still remains liable to be again called up for service during a certain period from his entry into the service.

[They referred to the Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), ss. 1, 2; the Naval Forces Act, 1903 (3 Edw. 7, c. 6), s. 1; and the Royal Naval Volunteer Reserve Act, 1917 (7 & 8 Geo. 5, c. 22), s. 1; and further cited in *In re A Debtor* (1) and *Fudge v. D'Ardenne*. (2)]

Hansell for the respondent. The object of the Emergency Acts with relation to officers and men in His Majesty's Forces was to protect them while on service from being harassed by money troubles while they were so serving. Those Acts were never intended to extend protection to persons who had practically returned to civil life.

The effect of the Acts relating to the formation and constitution of the Royal Naval Volunteer Reserve with reference

(1) [1919] 1 K. B. 169.

(2) [1916] 6 W. N. 415.

to the position of the debtor is that he is not bound for any particular term of service, but he is liable to be called up for service during a period of three years from the date of his entry into the force. After demobilization his connection with the force is practically severed, though until discharge he still remains liable to be called up. The protection afforded to officers by the Courts (Emergency Powers) Acts is not intended to be extended to such a case.

Clayton K.C. in reply. So long as the debtor is not discharged or gazetted out he remains an officer of His Majesty's Forces and liable for three years to be called up for active service. The Act of 1920 does not deprive him of the protection to which he is entitled under the Emergency Acts.

At the close of the arguments the Court adjourned the case in order that further information might be obtained from the Admiralty as to the meaning and effect of demobilization with reference to officers of the Royal Naval Volunteer Reserve.

The following questions were by the direction of the Court formulated and sent by the appellant's solicitors to the Secretary of the Admiralty with a request that the Court might be supplied with answers thereto :—

1. The power by which demobilization takes place.
2. Are the Royal Naval Volunteer Reserve demobilized by statute or regulations ?
3. Were there any regulations made under the statute of 1903, and if so, what ?
4. Are there any statutes or regulations in any way bearing upon the definition of mobilization or demobilization ?
5. Have any regulations been made under s. 1, sub-s. 2 (ii.), of the Act of 1903 ?
6. Are there any regulations under which a man may retire ?
7. Is it the practice to gazette Royal Naval Volunteer Reserve officers out ? If so, why have sixteen months been allowed to elapse before doing so ?
8. Is an officer in the Royal Naval Volunteer Reserve, not on actual service, entitled to wear his uniform ?

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C. A. On November 16, 1920, the Secretary to the Admiralty
1920 wrote to the solicitors as follows :—

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“ With reference to your letter of the 1st inst., relative to the case of Lieut. — R.N.V.R., I am commanded by My Lords Commissioners of the Admiralty to furnish you with the following replies to the questions contained in the enclosure to your letter :

“ 1. Demobilization takes place by the executive authority of the Admiralty—see Royal Proclamation of August 3, 1914, made under the Naval Forces Act, 1903, the last paragraph of which authorizes the Admiralty ‘ to give . . . and to revoke directions ’ for calling out volunteers.

“ 2. In accordance with this Proclamation directions have been issued from time to time and were finally embodied in one Order, namely, Monthly Order 921/19, a copy of which is sent herewith for information.

“ 3, 5, and 6.—Various regulations for the R.N.V.R. have been made under the Statute of 1903 from time to time and are embodied in the Regulations for the R.N.V.R., 1909, but an Addendum was issued in 1914. None of these regulations deals with demobilization, but one relates to the resignation of their commissions by officers in the R.N.V.R., and is to the effect that when not called out officers will be permitted to resign their commissions or appointments at the discretion of the Admiralty.

“ 4. There are no regulations defining ‘ demobilization ’ so far as individual officers or men are concerned ; the only official definition referring to the whole process of disbandment of the Naval Force is as follows :—‘ The whole process of disbandment of such men of the Naval Forces now serving therein as will leave active service on the reduction of the Navy to its peace footing.’

“ 7. It has not been the practice to gazette out officers, though this has been done in some cases. Demobilized officers pass to the status of volunteers not called out for service and do not pass out of the force by the mere fact of demobilization. One comprehensive order will be made cancelling all temporary commissions granted during the war,

not previously cancelled, as soon as the statutory date for the termination of the war has been fixed.

"8. An officer in the R.N.V.R. not on actual service is not entitled to wear his uniform except on certain ceremonial occasions or when undergoing drills or training. Officers were, however, allowed to wear uniform for one month after demobilization."

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1920. Dec. 3. LORD STERNDALÉ M.R. This appeal raises the question whether the debtor, owing to his position or status, is protected from having a judgment, upon which the receiving order appealed from was founded, enforced against him. The case may possibly be of some importance because the question is whether a naval officer who has not been formally discharged, in the sense that his commission has not yet been cancelled, is entitled to the protection for which the debtor here asks, and, as we have an intimation from the Admiralty that the intention is to cancel these commissions en bloc, if I may say so, when the war is legally terminated, and as that termination seems to be continually delayed this may be a matter of some importance.

The debtor claims that the receiving order ought not to have been made against him because he is protected by the Courts Emergency Acts. [His Lordship referred to those Acts and continued:] Some reliance was placed upon the words "have ceased to be members of those Forces" in s. 1 of the Act of 1920 as qualifying the earlier Act of 1917. I do not think they do qualify it. They may perhaps be some little guide as to the meaning and construction of the earlier Act, but that is the whole extent to which, in my opinion, they can go. Those being the provisions relied upon by the debtor, as giving him protection, it is necessary to consider his position. He was in civilian employment up to July, 1918. On April 12, 1918, that is, while still in civilian life he contracted a debt in respect of a sum of money which he borrowed from a friend. On July 4, 1918, he obtained a commission in the Royal Naval Volunteer Reserve. On November 20, 1918, judgment was obtained against him for

C. A. the amount of the debt. On July 17, 1919, he was
1920 demobilized. On March 5, 1920, a bankruptcy notice was
A DEBTOR, served upon him, the failure to comply with which was the
In re. act of bankruptcy relied upon in the petition. It will be seen
Lord Sterndale that that bankruptcy notice was served upon him more than
M.R. six months after the date of his demobilization, and the
question is whether, for the purposes of this legislation with
which we are dealing, he ceased to be a member of His
Majesty's Forces when he was demobilized. His certificate
of demobilization was in the following terms. [The Master
of the Rolls read the certificate and continued :] The effect
of demobilization from His Majesty's Naval Service is now
perfectly well understood for purposes of naval administration,
but the exact effect of it is not so clear to persons who are
not concerned with naval administration. The demobiliza-
tion of an army or part of an army is fairly well understood,
and has been so for some time, but the effect of the demobiliza-
tion of an individual from the Naval Service is not quite clear
at first sight. We thought it right therefore to get some
further information from the Admiralty as to the exact
incidents of demobilizing an individual from a service.
Some information had been supplied before the case came
before us. There was a letter signed for the Secretary to
the Admiralty, which was in these terms. [The Master of
the Rolls read the letter of June 1, 1920, and continued :]
In answer to a further question the same gentleman wrote
later as follows: "I am commanded by my Lords Com-
missioners of the Admiralty to inform you that this officer
has not been gazetted out of the Navy, and that a further
communication will be sent as to the third paragraph of your
letter." That same gentleman made an affidavit in which he
gives the dates on which the debtor joined the Naval Reserve
and the date on which he obtained his commission. Then
he repeats that his position is governed by the Acts which I
have mentioned. [His Lordship then further referred to
the affidavit and continued :] The Act of 1917 enabled
His Majesty by proclamation to extend the service but that
proclamation only extended to officers who were in fact

called up for active service at the time of the issue of the proclamation. The only proclamation to which we have been referred is one which was issued before this gentleman was called up for active service, and therefore his term of service is three years, and three years only. But that is quite immaterial, because even the three years service has not yet expired. It would begin from the time he joined in July, 1918, and therefore his liability to serve would extend to July, 1921. That was the information which was before the Court when the case came before us. We thought it advisable to have some further information. We therefore asked several questions. [The Master of the Rolls then referred to the questions put by the Court and the answers thereto, and continued:] The statutes to which the Lords Commissioners of the Admiralty refer are the Naval Forces Act, 1903, and the Royal Naval Volunteer Reserve Act, 1917. By the Act of 1903 it was provided that it should be lawful for the Admiralty to raise and maintain a force to be called the Royal Naval Volunteer Reserve, and the members of that force then came to a certain extent under the provisions of the Royal Naval Reserve (Volunteer) Act of 1859, an Act for the establishment of a reserve volunteer force of seamen and for the government of the same. Parts of that Act however were excepted and did not apply to the Royal Naval Volunteer Reserve. It is not necessary to go through the provisions of the Act. The only matter which may be relevant is that Royal Naval Volunteers were exempted from ss. 2 and 3 of that Act, which dealt with the calling up of Royal Naval Volunteers for training when not on active service. The provisions also as to pay and pensions, and so on, were excepted, and a proviso to s. 5, by which His Majesty might extend the service of those called up, was also excepted and not applied. But that was restored by the Act of 1917 which it is not necessary to consider because, as I have said, on the facts it does not apply to this judgment.

Those, I think, are the only provisions to which I need refer, and the question is, what is the position of this gentleman now? Does he still come within the words of the Courts

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C. A. (Emergency Powers) Act of 1917 as extended by the War
1920 (Emergency Laws) Continuance Act of 1920 ? He was

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certainly a person who served as an officer in one of His Majesty's Forces. The question is, is he one who has ceased to be a member of those forces ? If he has, if he so ceased on demobilization then the period of six months after his so ceasing, during which he is protected, had elapsed at the time of this bankruptcy notice. I have looked at the circular or monthly order to which we were referred, No. 921 of 1919. I have already read the definition of demobilization : "The whole process of disbandment of such men of the Naval Forces serving therein as will leave active service on the reduction of the Navy to its peace footing." The definition of discharge is stated to be "The final discharge of men from the books of His Majesty's ships and establishments at the expiration of their twenty-eight days leave after which they revert to civil life." That is dealing with men, and the meaning of it is that when a man is demobilized he gets twenty-eight days leave, and then, as provided in a later part of the order, at the end of his twenty-eight days leave he is automatically discharged from actual service. That does not apply to an officer as I read the order. The officers are provided for in a section which is not under the heading of either demobilization or discharge. It is under the heading of "Release of officers" and provides that a certificate of demobilization will be issued by the Admiralty to every officer demobilized. Then it says that officers will be entitled to wear uniform for a period of one month after the date of their demobilization and upon other occasions authorized by the regulations. Then there follow a number of provisions, for the purpose of enabling officers so released to obtain civil employment.

The question is, as I say, whether this gentleman ceased to be a member of His Majesty's Forces on demobilization in July, 1918. I think his position is stated with fair accuracy in para. 7 of the answers given by the Lords Commissioners of the Admiralty. "Demobilized officers pass to the status of volunteers not called out for service and do not pass out

of the Forces by the mere fact of demobilization." The second part of that is true in a sense. It is true for the purpose of naval administration the demobilized officer still retains his commission. He is still liable to be called upon for active service, but he is returned to civil life. This gentleman is now occupied in some position in civil life, and I think we have to look at this, as far as we can, from a broad point of view. We have to consider, having regard to the intention of the Legislature, what was the real substantial position of the gentleman, and not whether technically and as a matter of law and of naval discipline he is still liable to be called upon for service. Looking at it in that way I find the debtor's position is this: He has been demobilized from the Navy. The result of that is that he no longer receives pay. He no longer has the right to wear the uniform, except on certain specified occasions on which the privilege of wearing it is granted to him. He is doing nothing whatever in the way of naval duties. He is pursuing his usual avocations in civil life, and it is fairly accurate to say that he is practically in the position of a volunteer not called out for service. This Emergency legislation was, I presume, passed for the purpose of preventing persons who were serving their country from being harassed by money troubles while they were actually so serving. Looking at it from that point of view, I think, that for the purposes of this legislation, this gentleman, as was said in the first letter of the Secretary to the Admiralty, for all practical purposes might be regarded as having severed his connection with the Naval Service. He no longer continued to be a member of His Majesty's Forces within the meaning of this legislation. On demobilization he ceased to be a member, and therefore the six months must run from that time. There is no authority exactly on the point. I find that the late Master of the Rolls in *In re A Debtor* (1), dealing with a man who was liable to military service under the Military Service Acts, and who had received a calling-up notice directing him to join the colours, said this: "In the case of a large number of men engaged in the ordinary

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occupations of civil life, contracting debts from day to day, whose daily business is not interfered with by their liability to be called up, there would be no sense or meaning in exempting every one of those persons from liability to execution in respect of debts incurred under contracts. The manifest object of such a provision was to protect soldiers—officers and men—engaged in the important business of warfare from being harassed by claims under contracts.” There, of course, he was dealing with a person liable to service but not yet called up. Here we are dealing with a gentleman who has not only been liable for service but who has actually served and been demobilized and been put in the position, which I have mentioned, of not receiving pay, or having the right to wear uniform, or the general rights of a sailor, being engaged in civil life. The position seems to me to be analogous to that with which the late Master of the Rolls dealt in *In re A Debtor*. (1)

I think, for these reasons, this gentleman did, on demobilization, for the purposes of this legislation, cease to be a member of His Majesty’s Forces, although he was still under a liability, in the sense that His Majesty had a claim upon his services, which he could exercise through the Lords Commissioners of the Admiralty if he thought fit. I think, therefore, the appeal fails and must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The question we have to determine is whether on March 5, 1920, the date of the bankruptcy notice on which the petition is founded, the debtor had for six months ceased to be a member of His Majesty’s Forces. March 5, 1920, was more than six months after July 3, 1919, the date as from which, using the words of the certificate of demobilization, this gentleman was demobilized from His Majesty’s Naval Service. The real question is whether, by the operation of that certificate, he, on that date, ceased to be a member of His Majesty’s Forces according to the true construction of the several Courts (Emergency Powers) Acts applicable to this matter.

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To my mind the question is not to be determined merely by considering in the abstract what is the meaning of the term used in the Emergency Acts, "officers or men of H.M. Forces," or the term, "member of H.M. Forces" used in the Act of 1920. I think you must look at the substance of the matter and consider, to some extent, what was the real intention of the Courts (Emergency Powers) Acts as relating to soldiers and sailors. I cannot express my view as to what was the real meaning and intention of those Acts better than by referring to that passage from the judgment of the late Master of the Rolls in *In re A Debtor* (1) which has been read by the present Master of the Rolls. It seems to me that the intention was to protect men who were actually serving in the Army or the Navy and for six months after the termination of their service.

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This gentleman obtained on July 4, 1918, a temporary commission in the Royal Naval Volunteer Reserve, commonly called the R.N.V.R. That force was raised under the Naval Forces Act of 1903, and it is of considerable importance to see what is in fact the position of a member of the Royal Naval Volunteer Reserve. The Act of 1903 provided: "That it shall be lawful for the Admiralty to raise and maintain a force to be called the Royal Naval Volunteer Reserve," and then: "That the provisions of the Royal Naval Reserve (Volunteer) Act of 1859, as amended by any subsequent enactment, shall apply to the force so raised, subject to the following modifications." The important modifications are these, that ss. 2 and 3 of that Act, which I will refer to directly, are not to apply to the Royal Naval Volunteer Reserve. I now turn to the Act of 1859, because it is impossible to understand the position of members of the Royal Naval Volunteer Reserve without considering that Act. That Act was passed at the time when the Volunteer Force generally was first established, and it particularly referred to the naval branch of that force. Sect. 2, which is excluded so far as the Naval Volunteer Reserve is concerned, is in these terms: [His Lordship read the section and

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C. A. continued :] We see therefore that the persons who volunteered under that Act became automatically volunteers, 1920

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and continued as such during a certain definite time, and continued liable to the provisions of the Act until actually discharged. None of those provisions apply to the Royal Naval Volunteer Reserve. Sect. 3 also does not apply to that body. But the importance of it is this, that it provided that the Admiralty might call upon volunteers to be instructed and trained on shore or on board any ships or vessels for a certain number of days in every year. That also does not apply to members of the Royal Naval Volunteer Reserve. They are under no liability for training under those provisions. The only liability under which they are is that which is provided by the first part of s. 5 of the Act of 1859, which is in these terms : [His Lordship read the section and continued :] This gentleman obtained his temporary commission, as I have said, on July 4, 1918. From that time he was, as we know, liable to actual service. He was demobilized on July 3, 1919, and the effect of that is stated in two slightly different ways, but I think substantially the same, by the Admiralty : first in the letter written on behalf of the Secretary of the Admiralty, and, secondly, in one of the answers to the questions which at our request were put to them, in these terms : [The Lord Justice referred to the letter and continued :] This particular officer was not liable to the five years but only to the three years, because he was not a member of the forces at the time of the proclamation under the Act of 1917. The matter is dealt with in the answers of the Admiralty to the questions put to them at our request in these terms : " Demobilized officers passed to the status of volunteers not called out for service and do not pass out of the Force by the mere fact of demobilization." What is the position then under the Royal Naval Volunteer Reserve Act of 1903 of an officer or man who has passed to the status of a volunteer not called out for actual service ? It seems to me that he is, to all intents and purposes, a civilian so long as he is not again called out for actual service. He is receiving no pay ; he owes, at the moment, no duty

to any superior officer. He is not under naval law. He is perfectly at liberty to lead his civil life and pursue any avocation which he may be pleased to adopt. Now a man in that position, having regard to what I have said as to the true construction of the Emergency Powers Acts, is not in my opinion from the time of demobilization an officer or man in His Majesty's Forces or, to put it the other way round, "on being demobilized ceases to be a member of H.M. Forces for the purposes of those Acts." There is no authority directly in point, but I think *In.re A Debtor* (1) is an analogous case and is of considerable assistance, not only for the passage to which I have already referred in the judgment of the late Master of the Rolls, but in its decision is of considerable importance for the purposes of this case. The point which had to be decided there was, at what date was a man to be regarded as having joined His Majesty Forces? The important question there related to the other end of the service. When did the service commence? The man there in question was a man who under the Military Service Acts was liable to military service but had not actually been called up. Being liable to military service he was, by the terms of the Military Service Act then in force, assumed to have enlisted and to have been passed into the Reserve. A man in that position might in strictness, and looking at it, as I have said, in the abstract and not with reference to the object of the Courts (Emergency Powers) Act, well have been held to be a member of that part of His Majesty's Forces which is denominated the Reserve, but this Court did not take that view. They held that the date at which he became a member of His Majesty's Forces was the date at which he was called up for actual service. That seems to me to apply to a great extent to the question we have to determine. It seems to me that this man for the purposes of these Acts ceased to be a member of His Majesty's Forces when, to use the words of the demobilization certificate, he was demobilized out of the Naval Service. He became then in the position of a man who was liable to service but who was not actually serving. For

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Warrington L.J.

(1) [1919] 1 K. B. 169.

C. A. these reasons I think the receiving order was properly made,
1920 and accordingly this appeal should be dismissed.

A DEBTOR,
In re.

LORD STERNDALÉ M.R. : Younger L.J. asks me to say that he agrees with the judgments which have been pronounced.

Solicitors for appellant : *Lloyd, Richardson & Co.*

Solicitors for respondent : *C. J. Smith & Hudson.*

G. A. S.

1921

Jan. 25.

GOODWIN v. RHODES.

Landlord and Tenant—Dwelling House—Recovery of Possession—House in Occupation of Owner—Action by former Tenant—Occupation given up owing to Service in Army—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 5, sub-s. 1 (g).

By s. 5, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, "no order or judgment for the recovery of possession of any dwelling house to which this Act applies, or for the ejection of a tenant therefrom, shall be made or given unless . . . (g) the dwelling house is required for occupation as a residence by a former tenant thereof who gave up occupation in consequence of his service in any of His Majesty's forces during the war."

The plaintiff was before August 8, 1917, the occupier of a cottage as a weekly tenant. On that date he gave up occupation in consequence of being called upon to serve in the army. He was demobilised in May, 1919. In the meantime the defendant, who was the owner of the cottage of which the plaintiff was formerly the tenant, had gone into occupation thereof. The plaintiff applied to the county court for an order for the recovery of possession of the cottage. The county court judge made an order for possession. On appeal :—

Held, that the action failed, inasmuch as the Rent Restrictions Act, 1920, was not an enabling Act, and did not confer upon a tenant a right of action which he had not before the passing of the Act. The object and scope of the Act was to restrict the right of landlords to raise rents or to recover the possession of dwelling houses except in certain specified cases.

APPEAL from a decision of the judge of the Blackpool County Court.

The action was brought by the plaintiff under s. 5, sub-s. 1 (g), of the Increase of Rent and Mortgage Interest

(Restrictions) Act, 1920, to recover possession of a cottage at St. Annes-on-the-Sea, which belonged to the defendant, and which was at the time when the action was brought in the occupation of the defendant.

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The plaintiff was before August 8, 1917, the occupier of the cottage as a weekly tenant, but he then gave up occupation in consequence of his being obliged to serve in the army, and his wife took a cottage at Altrincham. The plaintiff was demobilised in May, 1919, and went to live with his wife, but as he was unable to obtain work there he went back to St. Annes-on-the-Sea where he obtained work but had to live in lodgings in two rooms with his wife and six children. The defendant, who was the owner of the cottage which the plaintiff had formerly occupied, had in the meantime herself gone into occupation of that house. The plaintiff applied to the defendant to give him possession of the cottage, and eventually applied to the county court for an order that he might be at liberty to resume or enter into possession of the cottage.

The county court judge held that the effect of s. 5 of the Rent Restrictions Act, 1920, was that if a dwelling house was required for occupation by a former tenant who gave up possession in consequence of his service in His Majesty's forces, the former tenant was entitled to an order for possession, and the judge accordingly made an order for possession.

The defendant appealed.

E. Rowson for the defendant. The decision of the county court judge was wrong. No action can be brought under s. 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, against a landlord, who is in occupation of a dwelling house, by a former tenant thereof in order to obtain possession of that house. What the section contemplates is an action by a landlord against the present tenant of a dwelling house where the house is required for the occupation of a former tenant who had given up occupation owing to service in the army. The Act is not an enabling

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Act ; it does not confer a right upon a person to bring an action which he had not before the passing of the Act. The Act was intended to restrict the rights of landlords to raise the rents of dwelling houses or to recover possession of dwelling houses except in certain specified cases. Sects. 59 and 138 of the County Courts Act, 1888, deal with actions of ejectment and actions for recovery of possession of small tenements in the county court. The plaintiff must bring himself within one of those sections before he can maintain this action. Those sections only contemplate actions by the owners of the premises to recover possession thereof.

F. H. B. Hodgson for the plaintiff. Sect. 5, sub-s. 1 (g), of the Rent Restrictions Act, 1920, ought to be construed as conferring a right upon the former tenant of a dwelling house to recover possession of that house if he had to give up occupation thereof in consequence of his service in any of His Majesty's forces during the war. The section would be quite useless if it only means that the action for possession must be brought by the landlord. That paragraph was inserted in s. 5 solely for the benefit of the tenant, and it is the only paragraph in the section in which the landlord is not mentioned. The paragraph says "unless the dwelling house is required by a former tenant," if it was intended that the action should be brought by the landlord, it would have read "unless the dwelling house is required by a landlord for a former tenant." The events contemplated in para. (g) have happened in this case and the section ought to be read as conferring a right on the plaintiff to bring the action. The language of the section is clear and unambiguous and it ought not therefore to be limited by the preamble to the Act. It was the clear intention of the Legislature to help ex-soldiers, and that intention ought to be respected.

AVORY J. In my opinion this appeal must be allowed. The county court judge apparently acted under a misconception as to the object and purpose of the Increase of Rent

and Mortgage Interest (Restrictions) Act, 1920. In my view that Act does not create any new right of action; it does not confer upon a tenant any right of action which he had not before the passing of that Act. The whole scope and purport of the Act is to restrict the right of landlords to recover possession of premises. The heading to s. 5 states in terms that it is for the purpose of imposing "further restrictions and obligations on landlords and mortgagees." The section commences with the words "No order or judgment for the recovery of possession of any dwelling house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless" In my opinion the obvious meaning of those words is that a landlord shall not be entitled to recover possession of a dwelling house to which the Act applies or to eject a tenant therefrom, unless he can bring himself within one of the conditions specified in paras. (a), (b), (c), (d), (e), (f), (g) of that section. Paras. (a) to (f) are not material to this case. The condition set out in para. (g), which is the one in question in this case, is "the dwelling house is required for occupation as a residence by a former tenant thereof who gave up occupation in consequence of his service in any of His Majesty's forces during the war." It is because of that paragraph that the county court judge has assumed that the Act confers upon a former tenant who gave up occupation of a house in order to serve in the army the right to eject the landlord who is in occupation of the premises if the former tenant brings an action of ejectment against the landlord. In my opinion para. (g) means that a landlord shall not be entitled to recover possession of the dwelling house and to eject a tenant therefrom unless the landlord shows that the house is required for occupation as a residence by a former tenant thereof who gave up occupation for service in the army. That is however not this case at all. This is a case where a former tenant is seeking to eject the landlord on the ground that he (the former tenant) requires the house for occupation as a residence after having given up occupation in consequence of his service in the army. In my opinion the Act does not enable him to bring

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such an action. If it were necessary to look further into the Act sub-ss. 5 and 6 of s. 5 make it more plain that the meaning attributed to the section by the county court judge is not the correct meaning. Sub-s. 5 provides that: "an order or judgment against a tenant for the recovery of possession of any dwelling house . . . shall not affect the right of any sub-tenant to whom the premises or any part thereof have been lawfully sublet . . . to retain possession." Sub-s. 6 provides that "where a landlord has obtained an order or judgment for possession or ejectment . . . on the ground that he requires a dwelling house for his own occupation, and it is subsequently made to appear to the Court that the order was obtained by misrepresentation or the concealment of material facts, the Court may order the landlord to pay to the former tenant . . . compensation." The whole of s. 5 is only consistent with the view that it is intended to impose restrictions upon the former rights of landlords, and that it gives no new rights to tenants to recover possession of premises. The appeal must therefore be allowed.

SALTER J. I entirely agree. No one has the right to recover the possession of land unless he has an estate in it. The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, restricts the rights of landlords as against the occupiers of dwelling houses, and it restricts the rights of mortgagees as against mortgagors. The Act restricts the rights of owners as against occupiers to raise the rents of dwelling houses and to obtain possession thereof. It provides that owners of dwelling houses shall not eject tenants therefrom except in certain cases, which are set out in s. 5, sub-s.1, one of which is where "the dwelling house is required for occupation as a residence by a former tenant thereof who gave up occupation in consequence of his service in any of His Majesty's forces during the war." In that case a landlord may eject a tenant from the house in order to put a former tenant into occupation, provided he can persuade the Court to make an order for the recovery of possession of the house. That is all the section provides. The county court judge in my opinion

misapprehended the effect of the section. The appeal must therefore be allowed.

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Solicitors for plaintiff: *Norris, Allens & Co., for W. Banks & Co., Blackpool.*

Solicitors for defendant: *Jackson & Jackson, for Lonsdale & Grey, St. Annes-on-the-Sea.*

R. F. S.

DIRECT PHOTO ENGRAVING COMPANY, LIMITED v.
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1921

Jan. 25.

Mayor's Court—Practice—Removal of Action—Certiorari—Order by Master—Appeal—Discretion of Judge—Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), Sch., cl. 12.

By clause 12 of the schedule to the Borough and Local Courts of Record Act, 1872 (which was applied to the Mayor's Court by Order in Council): "No action entered in the Court shall before judgment be removed or removable from the Court into any superior Court by any writ or process, except by leave of a judge of one of the superior Courts in cases which shall appear to such judge fit to be tried in one of the superior Courts, and upon such terms, as to payment of costs, security for debt and costs, or such other terms, as such judge shall think fit."

An application was made to a Master of the King's Bench Division for a writ of certiorari to remove into the High Court an action which had been commenced in the Mayor's Court. The Master made an order removing the action into the High Court. On appeal from that order the judge in chambers held that he was not entitled to interfere with the exercise by the Master of his discretion, and he accordingly dismissed the appeal:—

Held, that even if the Master had jurisdiction to make the order for a certiorari the judge had power to exercise, and ought to have exercised, his own discretion with regard to the matter upon the hearing of the appeal.

Quaere, whether an application for a writ of certiorari to remove a case from the Mayor's Court into the High Court can be made to a Master of the King's Bench Division.

APPEAL from an order made by a judge in chambers.

The plaintiffs commenced an action in the Mayor's Court, London, against the defendant to recover the sum of 316*l.* 5*s.* 10*d.* the price of goods sold and delivered by the

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plaintiffs to a limited company called "My Garden Illustrated, Limited," in accordance with and in pursuance of written order for goods which it was alleged the defendant authorized to be signed on behalf of the company and in which the name of the limited company was not mentioned in the manner required by the Companies (Consolidation) Act, 1908, in that the word "Limited" was omitted from the name of the company.

The defendant was a director of "My Garden Illustrated, Limited." The orders in question were given for the making of blocks for illustrations and work in connection therewith for the journal "My Garden Illustrated" of which "My Garden Illustrated, Limited," were the proprietors. The orders were either signed personally by the editor of the journal or on his behalf. The orders, from which the name of the company was omitted, were not signed by the defendant personally. He alleged that he never authorized any person to sign orders on behalf of the company without setting forth therein the name of the company, and that it was not within his knowledge that any such orders had been given, and he denied that he was personally liable for the goods.

On an application by the defendant to a Master of the King's Bench Division at chambers for a writ of certiorari to remove the action from the Mayor's Court into the King's Bench Division of the High Court, it was alleged that difficult questions of law were likely to arise on the trial of the action, and that it was fit to be tried in the King's Bench Division. The Master ordered a writ of certiorari to issue removing the action from the Mayor's Court into the King's Bench Division upon the defendant paying the sum claimed into Court.

The plaintiffs appealed to the judge at chambers. The judge dismissed the appeal, stating that he did not consider he was entitled to question the discretion of the Master, although he doubted whether if he had himself been determining the application for the writ of certiorari he would have granted it. The judge however gave leave to appeal.

The plaintiffs appealed.

St. John Field for the plaintiffs. This action was brought against the defendant under s. 63 of the Companies (Consolidation) Act, 1908, which provides that "if any director . . . of a limited company . . . signs or authorises to be signed on behalf of the company any . . . order for . . . goods . . . wherein its name is not mentioned in manner aforesaid, he shall be . . . personally liable to the holder of any such . . . order for . . . goods for the amount thereof." The application for a certiorari to remove the action from the Mayor's Court into the High Court was made under clause 12 of the Schedule to the Borough and Local Courts of Record Act, 1872, which was applied to the Mayor's Court by an Order in Council of June 26, 1873. Under that clause, which destroyed the common law right which litigants formerly possessed of removing cases into the High Court, the leave of a judge of the High Court must be obtained before an action can be removed into the High Court: see also *Price v. Shaw* (1), although the practice as stated in Glyn and Jackson's Mayor's Court Practice, 3rd ed., p. 112, is for the application for a writ of certiorari to be made to a Master of the King's Bench Division. Even however if the application was properly made in this case to the Master, the judge was wrong in holding that inasmuch as the Master had exercised his discretion with regard to the matter he could not interfere. The Master is the deputy of the judge at chambers in order to dispose of a number of interlocutory applications, but if a party appeals against an order made by a Master the judge at chambers is bound to exercise his own discretion thereon. It was held in *Banks v. Hollingsworth* (2) that the expression "case fit to be tried in one of the superior Courts" must be taken to mean a case which "ought" to be tried there, or which is "more fit" to be tried there than in an inferior Court. Lord Esher M.R. there said that the expression "must mean where it appears to a judge that the action is one which ought to be tried in a superior Court," and Bowen L.J. said it was "a matter for the discretion of the

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(1) (1888) Unreported. See Glyn (2) [1893] 1 Q. B. 442, 447, 449. and Jackson, p. 113.

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judge": see also *Donkin v. Pearson*. (1) No questions of a complex or difficult nature are involved in this case, and any question as to the construction of s. 63 of the Companies (Consolidation) Act, 1908, can easily be decided in the Mayor's Court. In *Boize v. Edwards* (2) the Divisional Court refused to remove a case from the Mayor's Court into the High Court, as no question of difficulty arose in the case, and any question of law that might arise could be decided in that Court.

Bensley Wells for the defendant. The application for a writ of certiorari was properly made to the Master, that being in accordance with the practice stated in Glyn and Jackson's Mayor's Court Practice. Order LIV., r. 12, provides that "a master . . . may transact all such business and exercise all such authority and jurisdiction in respect of the same as under the Act or these rules may be transacted or exercised by a judge at chambers." The Master had authority under that rule to deal with this matter and could exercise the same discretion as if the application had been made to the judge. Sect. 24 of the Judicature Act, 1875, gives power to make rules of Court for modifying the practice or procedure of any Court. It is stated in the Annual Practice, 1921, p. 2258, that an order for a certiorari removing a case from the county court into the High Court is made by a Master in chambers, but no authority is cited for that statement. The Master in making this order was acting for the judge, and if the judge is satisfied on an appeal that there has been a proper exercise by the Master of his discretion he cannot overrule the Master's decision. A judge is entitled to review the exercise by a Master of his discretion only if the discretion has been exercised upon a wrong principle, in the same way as a Divisional Court is entitled to review the exercise by a judge of his discretion only when it has been exercised upon a wrong principle. The present case is a fit case to be removed into the High Court having regard to the amount claimed and the difficult questions of law involved with regard to the construction of s. 63 of the Companies (Consolidation) Act, 1908, and whether the mere fact that the defendant knew

(1) [1911] 2 K. B. 412.

(2) (1889) 5 Times L. R. 341.

that the editor was ordering goods for the company makes him personally liable for goods which were ordered without his knowledge or authority in an irregular manner.

St. John Field in reply. Order LIV., r. 12, does not apply to the case of an application for a certiorari to remove a case from the Mayor's Court into the High Court. When there is an appeal to the judge at chambers from a decision of a Master the matter is considered *de novo* by the judge.

AVORY J. This is an appeal from an order of the judge at chambers dismissing the plaintiffs' appeal from a decision of a Master ordering a writ of certiorari to issue to remove into the High Court an action which had been commenced in the Mayor's Court. By that action the plaintiffs were seeking to recover from the defendant a sum of money under the provisions of s. 63, sub-s. 3, of the Companies (Consolidation) Act, 1908—that is to say, the plaintiffs were seeking to make the defendant liable as the director of a limited company on the ground that he had authorized the signing of orders for goods, which orders did not contain the name of the limited company in manner required by that statute.

Upon the application being made to the Master in chambers by the defendant the Master made an order for the issue of a writ of certiorari to remove the action from the Mayor's Court into the High Court. I am not satisfied that that application was properly made to the Master or that he had jurisdiction to deal with it. I however do not decide that point in this case, having regard to the fact that apparently it has been the practice to make these applications to the Master, as appears from the statement on p. 2258 of the Annual Practice for 1921. But the inclination of my opinion is that that application ought to be made in the first instance to the judge at chambers and not to the Master. The application was made under clause 12 of the Schedule to the Borough and Local Courts of Record Act, 1872, which by an Order in Council of June 26, 1873, has been applied to the Mayor's Court. [His Lordship read the clause.]

I would observe in passing that the order which was made

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in this case contains no terms as to payment of costs, or as to security for costs, but only provides that the case should be removed into the High Court upon payment by the defendant of the amount claimed into Court. I have already said that my view is that applications under that statute for the removal of actions from the Mayor's Court and other Courts to which the Act applies into the High Court should be made to the judge in chambers and not to the Master. But for the purposes of my judgment to-day I will assume that the application in this case was properly made to the Master.

Two questions then arise in this case. The first is were there any real grounds upon which the Master could judicially determine that this was a case fit to be tried in a superior Court in the sense in which the words "fit to be tried" have been interpreted in *Banks v. Hollingsworth* (1)? The effect of that decision is that the words "case fit to be tried in one of the superior Courts" mean that the action is one which ought to be tried in one of the superior Courts—that is to say, that the case is one which is more fit to be tried in one of the superior Courts than in an inferior Court. The question therefore is whether there was any evidence before the Master that the case was more fit to be tried in a superior Court than in the Mayor's Court. It has been suggested that the Master made the order because it was contended before him that a question of law was involved in the case. It has been decided that the mere fact that a question of law is involved in a case is not a sufficient reason for making an order to remove a case into the High Court. In most cases some question of law arises, and the fact that questions of law arise in cases before inferior Courts and have to be decided by those Courts shows that that ground is clearly not a sufficient reason for making an order removing a case into a superior Court. I am not satisfied from the argument before us that any question of law arises in this case at all. It may be a mere question of fact whether the director of this company employed an editor and supplied him with paper for the

(1) [1893] 1 Q. B. 442.

purpose of ordering goods. If he supplied paper which did not comply with the requirements of the Companies (Consolidation) Act, 1908, because the name of the company did not appear thereon in the manner required by that Act, for the purpose of the editor ordering goods upon that paper, no question of law could possibly arise, and the question of fact would have to be determined against the defendant. But assuming that any question of law does arise the Mayor's Court is just as competent as the High Court to decide it.

If we have jurisdiction to overrule the Master I should come to the conclusion that the order which he made ought not to have been made. In my opinion we have jurisdiction, because it is clear that the discretion of the judge has not been exercised. The case was taken on appeal from the decision of the Master to the judge at chambers, and we are told by counsel that the judge expressed the view that inasmuch as the Master had exercised his discretion with regard to the matter he (the judge) was not at liberty to interfere, but that if he had been free to exercise his own discretion he would not have made the order, and he gave leave to appeal to this Court. In my opinion the judge took a wrong view as to his powers on the hearing of the appeal. The authority suggested for making the application to the Master in the first instance is Order LIV., r. 12. If that rule is an authority for the Master making the order I think that r. 21 of the same order is an authority for the judge to exercise his own discretion with regard to the matter upon the hearing of the appeal and in the exercise of that discretion to reverse the decision of the Master. If it were necessary, as Mr. Wells contends it is, for the judge at chambers to come to a conclusion that the Master had not exercised his discretion judicially but had decided the question upon extraneous considerations, before he could reverse the decision of the Master, in my opinion he might in this case have come to that conclusion, inasmuch as the Master apparently made the order because he thought that a question of law was involved in the case. But it is not necessary to put our decision upon

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that ground, because a judge at chambers has power upon the hearing of an appeal from the decision of a Master to exercise his own discretion with regard to the matter and to reverse the decision of the Master. As the judge did not in this case exercise his own discretion we have power to do so. I think no ground has been shown for removing this case by certiorari from the Mayor's Court into the High Court, bearing in mind that the schedule to the Act of 1872 entirely reverses the previous practice, because whereas previously a litigant had a right at common law to have a case removed from an inferior Court into a superior Court this schedule specifically says that no action shall be removed into the High Court unless it appears to a judge of the High Court that it is fit to be tried in the High Court. The appeal must therefore be allowed, and the order of the judge at chambers set aside.

SALTER J. I am of the same opinion. Clause 12 of the schedule to the Borough and Local Courts of Record Act, 1872, provides that an action shall not be removed from the Mayor's Court into a superior Court "except by leave of a judge of one of the superior Courts in cases which shall appear to such judge fit to be tried in one of the superior Courts, and upon such terms, as to payment of costs, security for debt and costs, or such other terms, as such judge shall think fit." Whether a writ of certiorari is to issue is a matter of discretion, and by the express terms of that clause the discretion is to be exercised by a judge of the High Court. In this case the Master made an order removing the action from the Mayor's Court into the High Court. The judge at chambers, upon the appeal from the decision of the Master, expressed the view that inasmuch as the Master had exercised his discretion with regard to the matter he had no jurisdiction to interfere unless the discretion of the Master had been exercised upon wrong grounds, and therefore he dismissed the appeal. I am not satisfied that the Master had a discretion to make the order which he made. We were referred to Order LIV., r. 12, as an authority for his making the order. That raises the question as to the authority

of the Master to do an act which is required by the Act of 1872 to be done by a judge. On that point we were referred to s. 24 of the Judicature Act, 1875. But that section only refers to the making of rules of Court for modifying the provisions contained in any Act of Parliament with respect to the practice or procedure of any Courts the jurisdiction of which is transferred by the Judicature Act to the High Court or to the Court of Appeal. Therefore that section does not apply to this case. I therefore think that there is no authority for the substitution of the Master for the judge as the proper person to whom such application should be made, although no doubt it has been the practice to make such applications to the Master instead of to the judge. If however the Master has power to make the order it is only subject to the possibility of his decision being reversed by the judge at chambers in the exercise of his discretion. No judge has exercised his discretion in this case, and we are therefore entitled to exercise our own discretion with regard to the matter.

If the defendant, as director of this company, authorized the editor to order goods but did not authorize the form in which the orders were given a question of law would arise as to his liability, but that is a point of law which the Mayor's Court is quite competent to decide. Therefore in my opinion the appeal ought to be allowed.

Appeal allowed.

Solicitors for plaintiffs : *H. S. Wright & Webb.*

Solicitors for defendant : *Carter Harrison & Armstrong.*

R. F. S.

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Feb. 7.

MAYO v. STAZICKER.

Local Government—Offensive Trade—Order of Local Authority declaring Trade offensive—Business established by Defendant before Order—Business let after Order—Resumption by Defendant—“Establishes”—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 112—Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 51, sub-s. 1.

By s. 112 of the Public Health Act, 1875, “Any person who . . . establishes” an offensive trade in a district without the written consent of the urban authority is liable to a penalty. In 1911 by an order of the local authority the trade of rag and bone dealer was duly declared an offensive trade within the section. In 1908, before the making of the above order, which consequently did not apply to him, the appellant had established the trade of a rag and bone dealer in certain premises, and continued to carry it on until August, 1918, when he let the premises on a yearly tenancy to J., who carried on the same trade there for nearly two years, but did not purchase the goodwill. The appellant then resumed possession of the premises and carried on the same business thereon in September, 1920. He was convicted of establishing the trade without the permission of the urban authority within the meaning of s. 112 :—

Held, that on resuming the trade the appellant did not “establish” it within the meaning of the section, but that he had established it in 1908. The conviction was accordingly quashed.

CASE stated by Crewe borough justices.

On September 21, 1920, the respondent, Henry Yates Stazicker, Chief Sanitary Inspector for the borough of Crewe, laid an information against the appellant, Stephen Mayo, charging that on September 14, 1920, he unlawfully did establish within the district of the urban authority, to wit at the corner of Farringdon Street and Meredith Street, Crewe, an offensive trade, that is to say, the trade of a rag and bone dealer without the consent in writing of such urban authority, contrary to s. 112 of the Public Health Act, 1875. The trade of rag and bone dealer is not included in the offensive trades enumerated in s. 112, but the borough of Crewe (called herein “the corporation”) adopted s. 51 of the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), on February 5, 1910, and duly made thereunder a declaratory order dated April 5, 1911, declaring the trade of a rag and bone dealer to be an offensive trade, and thereby

brought it within the operation of s. 112 of the Act of 1875. At the hearing on September 28, 1920, the following facts were proved or admitted.

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The appellant established a trade as rag and bone dealer at the above premises in April, 1908, and carried on the said trade therein down to August 30, 1918. Down to that date the order made in 1911 had no application to the appellant's trade established in 1903.

By an agreement dated August 30, 1918, the appellant let the premises to one John Joyce on a yearly tenancy, Joyce covenanting not to carry on at the said premises any business other than that of a rag and bone and metal dealer "similar to that carried on by the" appellant. Joyce applied to the corporation for permission to carry on the trade of a rag and bone dealer at the said premises, which was granted on September 11, 1918, and accordingly, he carried it on until June 24, 1920, when he vacated the premises.

The appellant resumed possession of the said premises and applied to the corporation for consent to reopen the said premises and to carry on therein the trade of a rag and bone dealer. On September 1, 1920, this application was refused. Notwithstanding this the appellant was carrying on the said trade on September 14, 1920, the date charged. The argument was conducted on the basis that the defendant had been actually carrying on the said trade since Joyce left the premises, the date September 14 being selected as subsequent to that of the above refusal.

It was contended on behalf of the appellant that he had not established his trade on September 14, 1920, but in April, 1908, and that, consequently, the order made subsequently in 1911 did not apply to him.

The justices in para. 8 of the case found as facts : (1.) That the trade of the appellant as a rag and bone dealer was established in 1908 and was carried on by him until 1918 when he let the premises to John Joyce. (2.) That Joyce carried on the trade of a rag and bone dealer at the same premises from September 1, 1918, to June 24, 1920, when the appellant resumed possession of the said premises.

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The justices were of opinion that there was a "break in the continuity of the business carried on by the appellant prior to 1918, and that the appellant established a new business when he re-opened in 1920." They accordingly convicted him and fined him, subject to this case.

The question for the opinion of the Court was whether upon the above findings the justices came to a correct determination in point of law.

Disturnal K.C. and Norman Birkett for the appellants. The conviction was wrong. Two offences were created by s. 112 of the Public Health Act, 1875 (1), as amended by s. 51, sub-s. 1, of the Public Health Acts Amendment Act, 1907 (1), first, that of establishing an offensive trade without the consent of the local authority, and, secondly, the carrying on of the trade which had been so established. The appellant was charged with the first offence. He did not "establish" the business on September 14, 1920, as charged, but in August, 1908, and as his trade was established before it was brought within the operation of s. 112 by the order of April 5, 1911, it was not at that or any subsequent date an "offensive trade" established within the meaning of the section. This case is really covered by *Butchers' Hide, Skin, and Wool Co. v. Seacome*. (2) What the section is concerned with is

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 112: "Any person who, after the passing of this Act, establishes within the district of an urban authority, without their consent in writing, any offensive trade; that is to say, the trade of blood boiler, or bone boiler, or fellmonger, or soap boiler, or tallow melter, or tripe boiler, or any other noxious or offensive trade business or manufacture, shall be liable to a penalty not exceeding fifty pounds in respect of the establishment thereof, and any person carrying on a business so established shall be liable to a penalty not exceeding forty shillings for every day on which the offence is continued, whether

there has or has not been any conviction in respect of the establishment thereof."

Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 51, sub-s. 1: "The words 'any other trade, business, or manufacture, which the local authority declare by order confirmed by the Local Government Board, and published in such manner as the Board directs, to be an offensive trade,' shall be substituted for the words 'any other noxious or offensive trade, business, or manufacture' in section one hundred and twelve of the Public Health Act, 1875."

(2) [1913] 2 K. B. 401.

the establishment of an offensive trade in a particular place and not with the person establishing it. Here the trade was established in this place since 1908 though there was a break in the continuity of the persons who carried on the trade.

Montgomery K.C. and *Villiers Bayly* for the respondent. This was a question of fact for the justices and there was evidence upon which they could find as they have done.

Place alone is not what the section is concerned with though, no doubt, it is the paramount consideration, but the person also. The permission is personal to the grantee as long as he carries on the trade, and that is why local authorities would never grant it to a company, which may never die. The words of s. 112 are, "Any person who . . . establishes . . . any offensive trade"—not "Where an offensive trade is established." There was here a break in the continuity of the business, and "business" and "trade" mean the same thing. If the appellant had let the premises for twenty years to a bookseller, and on his return had carried on the old business of rag and bone dealer on the premises, could it be said that he had not established a new business? Similarly if he had removed elsewhere leaving a successor to carry on the old business. To make this the same business as that established in 1908 at least it must be shown that the goodwill was transferred to Joyce and from Joyce back to the appellant, but there was no such transfer. If the appellant is right this business can go on for ever, however much the character of the neighbourhood may change. Parliament cannot have intended that.

[LUSH J. Then the appellant could never have sold the goodwill or disposed of it by will?]

Yes, but subject to the risk of refusal by the local authority to permit the establishment of the business in the new hands.

"Person" in the middle of s. 112 means the person who established the business.

Sect. 19, sub-s. 1, of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), dealing with the same subject matter seems to make it clear that in that Act change of proprietorship

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1921 means change of business, the words being "If any person (A) establishes anew" a business.

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AVORY J. The appellant in this case was convicted of having unlawfully established at certain premises in Crewe an offensive trade—namely, the trade of rag and bone dealer—without the consent in writing of the urban authority, contrary to s. 112 of the Public Health Act, 1875. My judgment is limited to the facts of this particular case, and I do not pretend to deal with the hypothetical cases suggested in argument, which may require further consideration.

The facts found are that the appellant established the trade of rag and bone dealer at the premises in question in April, 1908, and that he personally carried it on down to August 30, 1918. On that date he let the premises to a man named Joyce on a yearly tenancy, Joyce covenanting not to carry on any business on the premises other than that of rag and bone dealer. Joyce carried on that business until June 24, 1920. The appellant did not sell the business to Joyce, and Joyce paid him nothing except rent. Since June 24, 1920, the appellant has carried on the business himself, although the corporation refused him permission on September 1, 1920.

The contention on behalf of the respondent, which found favour with the justices, was that the appellant, when he resumed possession of the premises in June, 1920, was, within the meaning of s. 112 of the Public Health Act, 1875, "establishing" an offensive trade. It is to be observed that he was not charged with carrying on the business under the second part of the section. I do not say that it would have made any difference for this purpose if he had been so charged having regard to the decision of this Court in *Butchers' Hide, Skin and Wool Co. v. Seacome*. (1)

The date charged in the information was September 14, 1920, no doubt as being subsequent to the date when the appellant was refused permission to reopen.

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The question is, did the appellant in September, 1920, establish this trade? It was not one of the trades specifically mentioned in the Act, but was subsequently brought within its operation by an order which was made before September, 1920. The whole question is whether the justices could find in law that the appellant established this trade in September, 1920. In my opinion they could not. I think he established it in April, 1908, and that it remained and continued an established trade right up to the date in respect of which the appellant was charged; consequently it was not established after the making of the order which brought this trade within the operation of the Act. In my view the decision of this Court in *Butchers' Hide, Skin, and Wool Co. v. Seacome* (1) covers this case in principle, although the point in that case was not precisely the same. In that case the question was, where the trade had been established before an order was made under the Act of 1907, bringing the particular trade within the operation of the Act of 1875, whether a person could be convicted of carrying on that trade after the order came into operation, and it was held that he could not, because the words "carrying on" in s. 112 of the Act of 1875 were governed by the words "so established." The Court held that as the business had been established before the material date the person could not be convicted. In other words the Court in that case took the same view as we are taking. If the business in the trade has continued on the same premises without any break in the continuity of the trade such as would justify a finding as a matter of fact that a person had established a new trade, it remains the old established trade.

I have said that my judgment is limited to the facts of this case, and I do not express any opinion as to the effect of premises being closed for a considerable period, or of a different business being carried on therein for a short period. In such cases it might be open to a tribunal to find that the trade had been abandoned. In this case I think the justices were wrong, and the appeal must be allowed and the conviction quashed.

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LUSH J. I agree. In order to see whether an offence has been proved one must look at the precise terms of s. 112 and consider what was the real purpose of the enactment. What the section prohibits is the establishing of certain offensive trades without permission, and it specifies certain offensive trades. I think the intention of the Legislature was to prohibit the introduction into a district of an offensive trade without the written consent of the local authority. If, therefore, any one is proceeded against under s. 112 he would give a perfectly sufficient answer if he showed that he had not introduced the offensive trade, but that on the contrary he had found it already established, and that it had been created before he was concerned with it. That, in my view, is what the section plainly says. It does not deal with the proprietorship of the business at all, but with the particular trade, and if all that the person charged has done is to carry on what has been already introduced, he has committed no offence under the section. Most serious consequences would follow if we gave effect to the argument for the respondent. A man starts a manufacture similar to but not identical with soap boiling, which is one of the offensive trades enumerated in s. 112, at a time when it is quite legitimate to do so. After he has expended a large sum in laying down plant, the local authority for good reasons declares this particular industry to be an offensive trade. If that argument is correct the man who has expended the money in starting this legitimate business finds himself deprived of the benefit of the goodwill, and in possession of a business which he can no longer transfer to anybody else either by contract or will. Unless the section in plain terms has said so I should be slow to hold that that is what it means. In my opinion the first part of the section only refers to the first establishment of the trade without the consent of the local authority, and has no reference to the carrying on of the trade, while the second part deals with the carrying on of a business so established without the consent of the local authority. Mr. Montgomery for the respondent says that if our judgment is in favour of the appellant the trade on these premises may go on for all time

without the local authority being able to interfere ; but I may point out that when s. 112 was passed it did not make legitimate the carrying on of a trade which is a public nuisance. All that the section did was to empower the local authority to stop the establishing of a trade which might not amount to a nuisance.

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SANKEY J. I agree, and I desire to confine my judgment to the findings of the justices set out in para. 8 of the case. [His Lordship read them.] It was contended for the respondent that this is a question of fact, but I do not think the justices stated this case on any question of fact. They state that in their opinion there was a break in the continuity of the business carried on by the appellant prior to 1918, and that he had subsequently restarted it in 1920, and had then established the offensive trade within the meaning of s. 112 of the Public Health Act, 1875. The justices did not find nor, do I think, did they mean to find that the trade had ceased during the time the appellant was away ; the word they used was "business." In passing it may be noted that the word "business" does not occur in the first part of s. 112 ; it is not used until one comes to the general words. The section imposes a penalty for establishing the trade without permission and a further penalty for carrying on a business in the trade so established without permission. In my view the facts as found do not constitute the offence within the meaning of the Act of establishing an offensive trade in September, 1920, after the making of the order which brought this particular trade within its operation, and I think that a question of law is raised by the justices. It is to be observed that in the corresponding section of the old Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 64, the words are "the business . . . shall not be newly established," and in s. 19, sub-s. 1, of the Public Health (London) Act, 1891, the words are "If any person (a) establishes anew" the business.

In these circumstances I think that the justices were wrong, and that the appeal must be allowed.

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AVORY J. I meant to add that, as pointed out by Pickford J. in *Butchers' Hide, Skin, and Wool Co. v. Seacome* (1) the local authority can, under the provisions of s. 51, sub-s. 2, of the Public Health Acts Amendment Act, 1907, make by-laws with respect to any trade which is an offensive trade under s. 112 of the Public Health Act, 1875, whether established before or after the passing of the Act.

Appeal allowed.

Solicitors for appellant: *Foster Grave & Co., for Philip Baker & Co., Birmingham.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for H. S. K. Feltham, Crewe.*

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Dec. 21.

WELLESLEY v. WHITE.

Landlord and Tenant—Dwelling-house—"Order" for Recovery of Possession—Consent Order—Application to rescind Order—"House"—Adjoining Buildings and Garden—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 5, sub-s. 3; s. 12, sub-ss. 1, 2 (c) (iii).

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5, sub-s. 3, provides: "Where any order or judgment has been made or given before the passing of this Act, but not executed, and, in the opinion of the Court, the order or judgment would not have been made or given if this Act had been in force at the time when such order or judgment was made or given, the Court may, on application by the tenant, rescind or vary such order or judgment in such manner as the Court may think fit for the purpose of giving effect to this Act":—

Held, that that sub-section applies only to an order or judgment made or given in invitum as regards the tenant, and not to an order or judgment made or given by consent of the parties.

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 2, proviso iii., enacts that "for the purposes of this Act, any land or premises let together with a house shall, if the rateable value of the land or premises let separately would be less than one quarter of the rateable value of the house, be treated as part of the house, but, subject

to this provision, this Act shall not apply to a house let together with land other than the site of the house"—

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Seemle, per Lush J., that in that proviso the term "house" may include, besides the actual dwelling-house, the adjoining outbuildings, stable and garden.

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APPEAL from Basingstoke County Court.

The defendant, White, a miller, was the tenant of a holding in the county of Southampton, known as Diple Mill, on a tenancy from year to year at the yearly rent of 30*l*. The holding comprised, (i.) a dwelling-house with an outhouse, detached stable, and small garden, an adjoining mill and granary, both communicating with the house by connecting doors, but the mill not being on the same level as the house, and a piece of water, and (ii.) a grass field or meadow. The rateable value of the house, garden, and other buildings was 20*l*., and of the field 4*l*. 15*s*. In June, 1919, the plaintiff, Wellesley, who had purchased the freehold, served upon the defendant a notice to quit the holding at Christmas, 1919. The defendant, not having complied with that notice, the plaintiff brought an action of ejectment against him in the county court. On May 31, 1920, the action came on for hearing. The defendant was unable to claim the protection of the Increase of Rent Acts which were then in force, inasmuch as the letting included land—namely, the field, which was not within the curtilage of the dwelling-house, and therefore, he could not then resist the plaintiff's claim.

The parties accordingly entered into an agreement or compromise to the effect that the defendant should give up possession of the field forthwith in consideration of his being allowed to retain possession of the house, buildings and garden until September 29, 1920, and that the rent should be apportioned accordingly, the terms of the compromise being indorsed on behalf of the parties upon the papers in the case. With the consent of both parties an order in the terms of the compromise was then made by the county court judge.

On July 2, 1920, the Increase of Rent, &c. (Restrictions), Act, 1920, came into force, which by s. 12, sub-s. 2 (c), applies to a house where either the annual amount of the standard

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rent or the rateable value does not exceed, elsewhere than in the metropolitan police district, and in Scotland, 78/.

The defendant gave notice dated August 13, 1920, of an application to the county court under s. 5, sub-s. 3, of the Act of 1920 to rescind the above-mentioned consent order on the ground that since that order he had become entitled to protection under that Act, inasmuch as if the land and premises which had been let together with the house were let separately from it the rateable value of the land and premises would be less than one quarter of the rateable value of the house, and, therefore, under s. 12, sub-s. 2, proviso (iii.), of that Act the land and premises should be treated as part of the house.

On August 23, 1920, the county court judge dismissed the application on the ground that he was not satisfied that the rateable value of the said land and premises, if let separately, would be less than one quarter of that of the house.

The defendant appealed.

J. E. Y. Radcliffe (*H. P. St. Gerrans* with him) for the defendant, appellant. The county court judge ought, under s. 5, sub-s. 3, of the Increase of Rent, &c. (Restrictions), Act, 1920 (1), on the application of the defendant, to have rescinded the previous order for possession, inasmuch as that order would not have been made if that Act had been in force at the time when it was made. The property comprised in the holding would as a whole have constituted a dwelling-house to which that Act applied, as to which, under s. 5, sub-s. 1, an order for possession could not have been made. The term "house" in s. 12, sub-s. 2, of that Act is not limited, as the county court judge apparently thought, to the actual dwelling-house, but includes premises connected with it. Here the dwelling-house along with the other buildings and garden constituted the "house." The rateable value of the land—namely, the field—let together with the house is, as appears from the rate book, less than one quarter of the rateable value of the house, and therefore under proviso (iii.) (2) of that

(1) The terms of the sub-section are set out in the headnote.

(2) The terms of the proviso are set out in the headnote.

sub-section, that land must be treated as part of the house. The whole subject-matter of the letting thus constitutes a house, and as it comes, as regards locality and rent, within clause (c) of the sub-section, it is to be deemed to be a dwelling-house to which the Act applies, as to which no order or judgment for recovery of possession shall be made or given except in certain special cases which it is not here material to consider : see s. 5, sub-s. 1.

Gilbert Stone for the plaintiff, respondent. The county court rightly dismissed the defendant's application under s. 5, sub-s. 3, of the Act of 1920, (1) to rescind the order for recovery of possession of the demised premises.

Not only was that order properly made under the Acts then in force, but it would have been properly made even under the Act of 1890 if that Act had then been in force. That Act by s. 12, sub-s. 2, proviso (iii.) (2), does not apply to a house let together with land or premises other than the site of the house, unless the rateable value of the land or premises if let separately would be less than one quarter of the rateable value of the house, in which case it may be treated as part of the house. In that sub-section the term "house" means the actual dwelling-house only and does not include other premises more or less closely connected with it or within the same curtilage. In the present case the term must be limited to the dwelling-house itself, and does not comprise the outhouse, stable, mill buildings, garden, piece of water, or field, all of which are to be regarded as land or premises let together with the house. There is no evidence to show that the rateable value of these lands or premises, if let separately, would be less than one quarter of the rateable value of the house, and therefore they cannot be treated as part of the house, and the house must be regarded as one to which the Act does not apply.

The finding of the county court judge that the rateable value of the land or premises let together with the house would not, if they were let separately, be less than a quarter

(1) The terms of the sub. section are set out in the headnote.

(2) The terms of the proviso are set out in the headnote.

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of the rateable value of the house was a finding of fact, and as it was not unsupported by evidence, it ought not to be disturbed. In s. 5, sub-s. 3 (1), the word "may" is to be read as "may" and not as "shall," and the sub-section gives the county court judge a discretion to rescind the existing order and apply the provisions of the new Act, or not to do so, as it thinks right : *Taylor v. Faires*. (2)

Further, an order by consent is not an "order" within the meaning of s. 5, sub-s. 3 (1), of the Act, and therefore as the order for recovery of possession of the premises was made by consent of the defendant, the county court judge had no jurisdiction under that sub-section to rescind or vary it.

Radcliffe in reply. The term "order" in s. 5, sub-s. 3, applies to an order made with the consent of the tenant as well as to an order made against his will, and the Court has jurisdiction under that sub-section to rescind or vary an order of either of these classes. A consent order is no less an order of the Court than an order made without consent. If it is disobeyed, it is equally enforceable by execution. The sub-section is intended to enable the tenant to apply for protection against any order of the Court whether made by consent or not. If the present Act had been in force the defendant would not have consented to the order in question, and the Court would not have made it.

The term "house" in s. 12, sub-s. 2, means that for which the rent is paid, or which has a rateable value. Here the rent is paid for the actual dwelling-house together with the adjoining buildings and the garden; and the rateable value is assigned to the dwelling-house together with these other premises.

LUSH J. This case raises questions of a somewhat puzzling character relating to the construction of provisions in the Increase of Rent, &c. (Restrictions), Act, 1920. The plaintiff let to the defendant property which comprised a mill with an adjoining mill house and small garden, and also a field or

(1) The terms of the sub-section are set out in the headnote.

(2) [1920] W. N. 349.

paddock. The plaintiff brought an action in the county court for recovery of possession of the premises, and in May, 1920, that action was pending. The defendant was not protected by the Increase of Rent Acts which were then in force, because they did not apply to the property in question, and he could not have successfully resisted the plaintiff's claim. The parties entered into a compromise, the defendant agreeing to give the plaintiff immediate possession of the field, in consideration of the plaintiff allowing him to remain in occupation of the mill, house and garden, until September 20, 1920. The county court judge then made an order with the consent of the parties in the terms of the compromise. It is true that effect was given to the compromise by the judge's order, but the order was not made in invitum as regards the defendant who had agreed to it. Subsequently, the Act of 1920 came into force, and the premises which were then let to the defendant were within its protection. By the consent order, however, the defendant was bound to give up possession of the premises in September, 1920. The only course he could take with a view to escaping that obligation was to make an application under s. 5, sub-s. 3, of the Act. [His Lordship read that sub-section. (1)]

One of the questions raised is whether the term "order" or "judgment" in that sub-section applies to an order or judgment which has been made by consent of the parties. In my opinion it does not. It seems to me that the power to review a previous order which the sub-section gives to the Court, is only given in respect of an order which the Court after consideration of the circumstances and in the exercise of its judicial discretion has made in invitum as regards the tenant. To say that the sub-section gives the Court power to review an order which has been made by consent of the parties would be to say in effect that it is empowering the Court to alter a compromise which the parties themselves have agreed to. The sub-section presupposes that the judge has exercised his own mind in the making of the order which he is asked to rescind or vary. In the present case

(1) The terms of the sub-section are set out in the headnote.

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the order which the judge was asked to review was not in substance an order which had been made by him, or as to which he had ever had occasion to inquire whether it was just and fitting that it should be made. The order was to all intents and purposes made by the parties themselves. That being so, I think that this case is not one to which the sub-section applies. To my mind this construction of the sub-section does no injustice to the defendant. I cannot see that a person who has entered into a bargain to give up an advantage in consideration of obtaining some other benefit has any right to ask that he should be relieved from his bargain by later legislation. The new Act which has come into force since the consent order in question was made enables a tenant who has been turned out of his holding by the Court against his will to obtain relief; but here the tenant in effect turned himself out. On the ground that the consent order in question is not an "order" within s. 5, sub-s. 3, I think that this appeal should be dismissed.

The other question that has been raised is whether in a case like the present in which the letting comprises a dwelling-house and other premises adjoining it, the term "house" in s. 12, sub-s. 2, proviso (iii.) (1), includes, besides the actual dwelling-house, the adjoining premises with the result, as the defendant contends, that in this instance, the whole should be deemed a dwelling-house to which the Act applies, or whether the term is limited to the actual dwelling-house only. Although it is unnecessary for me to express any opinion upon that question, having regard to the conclusion at which the Court has arrived upon the first question, yet I may say that I am disposed to agree with the defendant in thinking that in that proviso the term "house" has the wider meaning and applies not only to the dwelling-house, but also to the adjoining buildings and the garden.

I base my judgment, however, upon the ground that an order by consent is not an order within the meaning of s. 5, sub-s. 3.

(1) The terms of the proviso are set out in the headnote.

McCARDIE J. When this action was brought it was clear that the demised premises were excluded from the protection of the Increase of Rent Acts which were then in force by s. 2, sub-s. 2, of the Act of 1915, inasmuch as they included land which was not within the curtilage of the dwelling-house. On May 31, 1920, the action came on for trial before the county court judge, and before it was actually heard by him the parties came to an agreement, the defendant consenting to give up the meadow at once, and the plaintiff consenting that the defendant should remain in possession of the buildings until September, 1920, the rent to be apportioned accordingly, and that agreement was indorsed on behalf of both parties upon the papers in the case. The parties having voluntarily entered into an agreement involving mutual concessions, the judge, accepting that agreement, made an order in the same terms, and no other order. He expressed no opinion, exercised no discretion, and did not act in invitum as regards either party, but merely put the agreement on the record of the Court. A contract was thus made between the parties which passed without alteration into a record of the Court. Afterwards in July, 1920, the present Act was passed. The defendant then made an application to the county court judge under s. 5, sub-s. 3, of that Act to rescind the order. The judge refused the application on a ground which may well be open to argument.

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The first question, however, is whether the judge had any power under that sub-section to rescind or vary the order. I agree with my Lord in thinking that the sub-section contemplates that the order or judgment made before the passing of the Act, which the Court is asked to rescind or vary, is an order or judgment which expresses the opinion of the Court itself as to the matter to which it relates, and which was made in invitum as regards the tenant, and not merely for the purpose of carrying out a compromise between the parties. It cannot, I think, have been intended that the judge should entertain an application under the sub-section in respect of an order or judgment made by consent, because if he did so he would be assuming not only to rescind or vary the order or judgment,

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but to set aside the bargain which the parties had voluntarily entered into for valuable consideration. To take an illustration. Suppose that in the present case by the agreement embodied in the consent order the landlord in consideration of the tenant giving up possession of part of the premises at once, not only granted him the privilege of staying on in the house for a time but also gave him a sum of 100*l.* as compensation, could it be said that the judge had power to set aside the arrangement between the parties and direct that the landlord should give possession of the premises to the tenant and that the tenant should repay the money to the landlord? It seems to me that s. 5, sub-s. 3, is not intended to apply to a case of that kind, but only to a case where the order embodies the independent opinion of the judge and has been made *in invitum* as against the tenant.

I desire to reserve consideration of the difficult question which arises under s. 12, sub-s. 2 (c), and proviso (iii.).

Appeal dismissed.

Solicitors for appellant: *Walker & Rowe, for E. T. Close, Camberley.*

Solicitor for respondent: *R. F. H. King, for H. Wills Chandler, Basingstoke.*

J. R.

[IN THE COURT OF APPEAL.]

C. A.

BOYNTON AND OTHERS *v.* THE COMMISSIONERS FOR
THE ANCHOLME DRAINAGE AND NAVIGATION.

1920

April 21, 22 ;
May 11.

[1918. B. 1030.]

[GREAT GRIMSBY DISTRICT REGISTRY.]

[1918. B. 10.]

Statutory Body—Public Authority—Drainage Commissioners—Powers and Duties—Construction and Maintenance of Drains—Discretion or Obligation—Negligence—Breach of Duty—Ancholme Level Drainage Acts—7 Geo. 3, c. 98—42 Geo. 3, c. 116—6 Geo. 4, c. clxv.—Continuing Injury—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.

By various statutes Commissioners were appointed for the purpose of draining certain low-lying lands with powers of rating the owners thereof to defray expenses necessary for perfecting the drainage. One of the statutes provided that the Commissioners "shall and may and are hereby fully empowered to make . . . alter, and maintain, or order and cause to be made . . . altered, and maintained, and from time to time to be repaired and kept in repair, all such cuts, drains . . . and works . . . as they . . . shall think necessary and convenient." Another statute provided that the Commissioners "shall have full power and authority, and they are hereby required . . . to make . . . alter, amend and maintain, or cause to be made, . . . altered, amended, and maintained, and from time to time repaired and kept in repair, all such cuts, drains . . . and other works . . . as shall in the judgment of themselves, and of . . . any . . . engineer to be from time to time appointed . . . be proper and necessary."

In pursuance of their powers the Commissioners in 1916 opened up an old river bed. In the year 1858 they diverted the course of another river and constructed a drain, known as the east drain, parallel to the course of this river. These works were done with a view to draining certain lands owned or occupied by the plaintiffs. The work of opening up the old river bed was done as the engineer to the Commissioners thought necessary and convenient, but it was done negligently. The east drain was from time to time cleansed as the engineer thought necessary, but it was not cleansed thoroughly or often enough. As the result of these defaults the plaintiffs' lands were flooded and injured. In an action by the plaintiffs against the Commissioners :—

Held, that the statutes did not merely confer a discretion upon the Commissioners as to the maintenance and repair of works executed by them, but imposed a duty upon them to maintain and repair the works until they should be abandoned, and that, not having performed this duty, the Commissioners were liable.

One of the statutes provided that if any person should sustain damage

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or injury in his lands by any neglect or default of the Commissioners by reason of any alteration made by them on account of the works to be made by virtue of the Act, then, if the Commissioners and the party injured should not agree touching the damages, the Commissioners should ascertain the damages by a jury to be empanelled and returned as therein provided and give judgment for the party aggrieved as therein directed.

Held, that this enactment did not apply where liability was disputed, and that the jurisdiction of the Court was not ousted thereby.

By s. 1 of the Public Authorities Protection Act, 1893, "Where . . . any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect: (a) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof" . . .

Held, that this section afforded no defence to the Commissioners inasmuch as the injury and damage were continuing.

Judgment of Greer J. reversed.

APPEAL from the judgment of Greer J. in an action tried before the learned judge without a jury at the Lincoln Assizes.

The plaintiff Mrs. Boynton was the owner, and the plaintiffs T. Raby and J. Hardy were the joint lessees, of South Gulham Farm, which included certain fields within the Level of Ancholme in the county of Lincoln numbered 10, 14, 18, and 300 upon the map which was used at the trial.

The defendants were a body whose constitution powers and duties were defined by the three Acts of Parliament mentioned below.

Fields 14, 18, and 300 were drained by means of field drains emptying into a drain or ditch alongside a road known as Owersby Lane. The water from this ditch was then conveyed through a culvert passing under Owersby Lane into a field in a neighbouring farm. This field was known as Mickledale and was numbered 285. Field 10 was similarly drained by field drains leading into an open drain between fields 10 and 14.

The plaintiffs brought this action for damages against the defendants, alleging that the defendants had omitted to repair and cleanse the drain or drains in field 285 which received the water from fields 14, 18, and 300 through the

culvert under Owersby Lane, and that the defendants by this default had caused fields 14, 18, and 300 to become flooded and water-logged. With regard to field 10 they alleged that the northern part of it was flooded by the same cause; but as to other part lying to the south-west they alleged additional defaults of the defendants causing the flooding of this portion.

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The facts were as follows: In the year 1865 the Old Ancholme River received the drainage from fields 14, 18, and 300, and it was cleansed and maintained by the Commissioners. In that year one Davy, who was the tenant of field 285, connected the end of the culvert under Owersby Lane with a newly constructed underground drain, and partially filled up the Old Ancholme. The filling up of the Old Ancholme in field 285 and the substitution of the new drain were reported to the Commissioners by their then engineer on March 15, 1865. They took no objection, but they never adopted the new drain as one of their drains. It was always treated like the culvert under Owersby Lane as a private drain belonging to the landowner. The Old Ancholme was not completely filled up, but was left as a depression in the land in which occasionally some water collected and ran along the bed in a northerly direction. It ceased to be used as a drain by the Commissioners in 1865. In January, 1914, the owner of fields 14, 18, and 300 made a complaint of the flooding of these lands. In 1915 the engineer of the Commissioners was requested to report on the matter. He recommended four alternative schemes, one of which was to reopen the filled up channel of the Old Ancholme. This was done in the summer of 1916 by workmen employed by the Commissioners who made a grip or channel in the depression which was all that remained of the Old Ancholme. The work of restoring the condition of the Old Ancholme to make it suitable for carrying away the drainage water from the culvert under Owersby Lane was not done with reasonable care and skill; if the engineer had given the matter reasonably careful consideration he would have made a deeper grip than he did. In 1916 and 1917 the flooding continued, and in 1918

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further work was done by the Commissioners' workmen and a channel was made which went down to the lowest level of the culvert under Owersby Lane. This caused a temporary improvement in the drainage of the fields, but, as there was no protection of the bed of the Old Ancholme, it got trodden down by cattle in places and obstruction was thus caused to the flow of such water as got through the culvert.

The additional damage to the south-west portion of field 10 was caused in this wise : At the time when the Commissioners were constituted the New River Ancholme was in existence. Its course was west of the Old River where it passed South Gulham Farm, the water from which would naturally find its way into the Old River. In or before the year 1858 the Commissioners caused the New River to be altered. They diverted its course so as to bring it to the east of the Old River and cut off the Old River from South Gulham Farm. They also constructed parallel to the course of the New River a drain known as the East Drain. They made this drain for the purpose of carrying out their statutory duties in respect of the drainage of the Ancholme Level, and they maintained it for the purpose, among others, of receiving and carrying away the waters from the ditch between fields 10 and 14 into which field 10 itself drained. From 1912 to 1919 the East Drain was not properly cleansed and consequently it failed to carry off the drainage which it received from the ditch and from field 10. The cleansing was not done often enough and was not thoroughly done when it was done ; but it was done as often as the engineer thought necessary. The effect of this failure to cleanse the drain properly was that the bottom was raised, the water in rainy weather rose more frequently above the level of the outlet of the culvert and remained above that level for longer periods than it would have done if the drain had been properly cleansed, and serious damage was thereby done to the lands and crops in field 10.

The powers and duties of the defendants and the purposes for which they were incorporated were declared by the following statutes :—

By an Act of 1767 (7 Geo. 3, c. 98) intituled An Act for

the more effectual draining the lands lying in the Level of Ancholme in the County of Lincoln, and making the River Ancholme navigable from the River Humber, at or near a place called Ferraby Sluice, in the County of Lincoln, to the town of Glamford Briggs; and for continuing the said navigation up or near to the said River, and from thence to Bishop Briggs in the said County of Lincoln; after reciting that the Level of Ancholme in the County of Lincoln extending from the River Humber to Bishop Briggs, containing many thousand acres of land, had been for several years drowned with water to the great damage and loss of the inhabitants and owners of lands within the said Level, and that the draining of the lands lying in the said Level and making the River Ancholme navigable, as therein mentioned, would be of great utility to the public, and tend to the considerable benefit and advantage of the owners of lands within the said level; it was enacted that the several persons therein named and their successors, to be elected as therein mentioned, should be and they were thereby appointed Commissioners for draining the said lands lying in the said Level of Ancholme, and for making the said River navigable, and for putting the powers contained in the Act into execution.

By s. 11 of this Act it was further enacted that for the better draining, preserving, and keeping dry the low grounds and carrs in the said Level, the said Commissioners "... shall and may and are hereby fully empowered . . . to make, dig, erect, set up, remove, alter, and maintain, or order and cause to be made, dug, erected, set up, removed, altered, and maintained, and from time to time to be repaired and kept in repair, all such cuts, drains, sewers, sluices, ditches, banks, clows, engines, and works, within, upon, or through any of the lands or grounds within the said Level, or in and through any part thereof; and to make tunnels under any ways, roads, or drains, of such depth, height, or wideness, and in such manner, order, and form, as they . . . shall think necessary and convenient; or to purchase any clows, or other works, which they shall think fit or proper for accomplishing the drainage and other purposes by this Act intended; and

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By s. 13 the Commissioners were authorized and required to tax the owners and occupiers of, and all the carrs or low lands within the limits of, the said Level with such yearly rates and taxes as to them should seem requisite and necessary for the purpose of effecting the drainage, not exceeding 2s. 6d. an acre for every acre. By s. 22 the Commissioners were directed to make a new sluice in the River Ancholme, near Ferraby Sluice, for stemming the tides, not less than 40 ft. wide and of sufficient height with double pointing doors towards the Humber to shut out the flow of the tides ; and to erect proper staunches not being in the main drain commonly known as the New River Ancholme which should be shut occasionally as the Commissioners or their surveyors should direct, for the purpose of navigation and retaining fresh water in dry seasons for the use of cattle and for scouring the outfall of the River Ancholme into the River Humber ; and to proceed to cause the River Ancholme to be widened and deepened from the sluice upwards in such manner and according to such dimensions as the Commissioners or their surveyors should think proper and convenient.

Sect. 38 was as follows : " If any person or persons, bodies politick or corporate, at any time after the said Commissioners, or any person or persons employed or authorized by them, shall have begun to carry this Act into execution for making the said drainage and navigation, or shall have completed the same, shall happen to sustain any damages or injury in his, her, or their lands, grounds, or hereditaments, for which they shall have had no recompence or satisfaction, by any

neglect or default of the said Commissioners, or their agents, workmen, or servants, or by reason of any alteration which shall be made by them, or any or either of them, on account of the works to be made by virtue of this Act; then, and in every such case, if the said Commissioners, or any five or more of them, and the parties by whom such damages shall have been sustained, shall not agree touching such damages, the said Commissioners . . . shall inquire of, and ascertain, such damages, by a jury to be impanelled and returned as aforesaid, and give judgment for the party or parties aggrieved, who shall recover the same accordingly, in the same manner and form as the damages and recompences are hereby appointed to be assessed and adjudged for any lands, tenements, or hereditaments which shall be in any wise made use of, cut, or damnified, in the execution of any the works by this Act directed and authorized."

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By an Act of 1802 (42 Geo. 3, c. 116) intituled "An Act for altering and enlarging the powers of" the aforesaid Act of 7 Geo. 3, after reciting that the surplus fund arising from taxes and tolls, after paying interest on mortgage debts had become very insufficient for the purpose of completing the works intended and of repairing the sluice, locks, bridges, and other works of drainage already executed whereby several of the works had become very defective; and that in times of rain the River Ancholme and other works of drainage were insufficient to contain and convey the flood waters thereof, by reason whereof the lands lying in the said Level were subject to be frequently overflowed, and additional outlets and other works were necessary for rendering the drainage effectual, for which purposes it was expedient that an additional sum of money should be raised and that the powers of the said Act should be altered and enlarged: Therefore it was enacted by s. 1 that the lands rated under the earlier Act should be charged with such additional or further sum as should be assessed by the Commissioners and should be paid and collected as directed by the former Act. Sect. 2 provided that such additional outlets and other works as the Commissioners should order or direct should be made and executed

C. A. according to a plan made for the purpose by John Rennie,
 1920 or such other engineer as the Commissioners should appoint.

BOYNTON By s. 10 the Commissioners were authorized and required to
 v. elect an assessor or assessors for ascertaining the proportions
 ANCHOLME of the assessments raised under the Act, to be charged on
 DRAINAGE the lands within each parish. By s. 13 the assessor or
 AND assessors were directed and authorized to ascertain and
 NAVIGATION award the proportions of the assessments raised under
 COMMISS- the Act to be charged with respect to the lands then rated,
 SIONERS. "as well for defraying the expences of obtaining this Act as for
 and towards the execution of the said additional outlets and
 other works and improvements before mentioned, and also
 the future repairs and support thereof, and other expences
 incident to the superintendence and support of the said
 drainage respectively," and to have regard in so doing to
 the further degree of benefit or improvement which the lands
 respectively would be likely to receive by means of the works
 above the present state of drainage. By s. 18 the Commis-
 sioners were authorized and required further to assess and
 charge the owners of the lands and the lands proportionately
 according to the assessment with such further sums as to them
 should seem "requisite and necessary for defraying the
 charges and expences of maintaining and repairing the works
 of the said drainage" and the salaries of such persons as might
 be necessary for the due execution thereof, and all other
 charges and expenses incident to or attending the said drainage.

By an Act of 1825 (6 Geo. 4, c. clxv.), which recited the
 earlier Acts and was passed for the purpose of altering and
 enlarging the powers conferred by them, it was enacted by
 s. 8 as follows :—

"The Commissioners . . . shall have full power and
 authority, and they are hereby required from time to time,
 and at all times hereafter . . . to make, dig, erect, set up,
 remove, alter, amend and maintain, or cause to be made,
 dug, erected, set up, removed, altered, amended, and main-
 tained, and from time to time repaired and kept in repair,
 all such cuts, drains, sewers, sluices, ditches, dams, banks,
 cloughs, outlets, engines, tunnels, bridges, and other works,

within, upon, or through any of the lands or grounds within the said Level, or in and through any part thereof, as shall in the judgment of themselves, and of John Rennie Civil Engineer, or any other engineer to be from time to time appointed in his stead as hereinafter mentioned, be proper and necessary for completing the drainage of the lands lying within the said level, and for continuing the navigation of the river Ancholme to Bishop Briggs."

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The judgment of the learned judge after an exhaustive statement of and comment upon the facts continued as follows :—

"The defendants contended that they were not liable in law for the damage caused to field 10 through the insufficient cleansing of the East Drain and the damage caused to fields 14, 18, and 300 by the inadequacy of Mr. Davy's drain down to 1916 or by the insufficiency of the measures they took in 1916 to restore the drainage by the Old Ancholme River, on the following grounds :—

"(1) that the statutes under which they exercised their jurisdiction left it to their discretion to take such measures by way of original construction or maintenance and repair as they thought necessary and convenient, or such as in their judgment and that of their engineer should be proper and necessary for completing the drainage of the lands, and that Parliament had expressly left these matters to their judgment, and that they had done all that they and their engineer deemed to be reasonably necessary :

"(2) that as a matter of law they could not be sued for mere non-feasance :

"(3) that if the plaintiffs had any remedy it was by assessment of damages by a jury under s. 38 of the Act of 1767 :

"(4) that if they were liable at all they were only liable in respect of their defaults or breaches of duty committed during the six months preceding the issue of the writ by s. 1 of the Public Authorities Protection Act, 1893. (1)

"In January, 1916, the Commissioners and their engineer

(1) See headnote.

C. A. decided that it was necessary, proper, and convenient to
 1920 open out the Old Ancholme River sufficiently to enable it
 BOYNTON to receive and carry away the drainage from a culvert under
 v. a road known as Owersby Lane, and they left it to their
 ANCHOLME engineer to decide the extent to which the Old Ancholme
 DRAINAGE Road (1) should be opened up across Mickledale. The
 AND engineer did in 1916 such work as in his judgment was
 NAVIGATION sufficient to carry out the decision of the Commissioners,
 COMMISSIONERS. and took such measures as he thought necessary and
 convenient and did such work as he judged to be reasonably
 necessary for completing the drainage of such parts of
 fields 14, 18, and 300 as are within the Level of Ancholme,
 but in my opinion his judgment was erroneous and such as
 a reasonably careful and skilful engineer should not have
 arrived at.

“As regards the cleansing of the East Drain I think the Commissioners decided that the amount of cleansing that was necessary, convenient, and proper was that which their engineer should from time to time decide upon as necessary, convenient, and proper in his judgment, and that he did all that was necessary, convenient, and proper in his judgment; but I think his judgment was erroneous and such as a reasonably skilful engineer should not have arrived at.

“As regards fields 10, 14, 18, and 300 it is necessary to consider the proper interpretation of the sections of the statutes which define the powers and duties of the Commissioners.” The learned judge then read s. 11 of the Act of 1767 and s. 8 of the Act of 1825 and continued: “Giving the best consideration I can to the matter I have come to the conclusion that these clauses are drawn in such a way as purposely to leave the decision as to all matters necessary, convenient, and proper for the drainage of these levels in the hands of the Commissioners, who are an unpaid body of trustees. The effect of these provisions in my judgment is to leave to the statutory body of unpaid Commissioners the power to decide what drains and other works should be undertaken and maintained for the purpose of draining the

(1) Sic; *quaere* River.

lands in question. There is no absolute duty imposed on them to make all such drains and other works as shall in fact be proper and necessary for the drainage of the lands. I have no right to substitute my own for their judgment as to what was necessary, proper, or convenient to be done either by way of original construction or by way of maintenance. They are by their statutes constituted the sole judges, and, whether they and their engineer have decided rightly or wrongly, it is in my opinion impossible to say that they have committed any breach of their statutory obligations so long as they have carried out their own decisions and the joint decisions of themselves and their engineer. It follows that my judgment must be in favour of the defendants on the grounds stated and it is unnecessary for me to consider the other points raised by the defendants."

In order to save a new trial in the event of his judgment being reversed, the learned judge assessed the damage done by flooding during the six years before the issue of the writ as follows: As to field 10: for loss of crops 198*l.* and for permanent damage to the soil 40*l.* As to fields 18 and 300, for loss of crops from ineffectual drainage before the work was done by the defendants in 1916 he assessed the damage at 32*l.* 10*s.*, but held that this damage was not attributable to the defendants but to Mr. Davy's private drain which the defendants had never taken over. The damage occasioned by inefficient work done in 1916 he assessed at 95*l.* and 10*l.* for damage to the soil. As to field 14, for loss of crops through ineffective draining before the work was done by the defendants in 1916 he assessed the damage at 63*l.* but held that this damage was not attributable to the defendants as above stated. The damage occasioned by inefficient work done in 1916 he assessed at 36*l.* and 10*l.* for damage to the soil.

Judgment was accordingly entered for the defendants.

The plaintiffs appealed.

Macmorran K.C., *Dyer K.C.* and *J. N. Emery* for the appellants. The learned judge took a wrong view of the

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obligation imposed upon the respondents by the Acts of 1767 and 1825. By s. 11 of the earlier Act the Commissioners "shall and may and are hereby fully empowered" to make and maintain or cause to be made and maintained and from time to time to be repaired and kept in repair all such cuts, drains, sewers and ditches as they shall think necessary and convenient. The effect of this section is to confer upon the Commissioners a discretion as to what cuts, drains, sewers and ditches shall be made, and possibly a discretion as to whether and when the use of a cut, drain, or sewer should be discontinued; but when a cut, drain, or sewer is being made it must be made with due care and skill, and when it has been made, and while it is in use, it must be maintained and kept in repair. The repair and maintenance of works in use is not left to the discretion of the Commissioners. Their obligation in this respect is absolute, as was the obligation in *Rex v. Marshland Smeeth and Fen District Commissioners*. (1) This obligation is imposed in clearer terms by s. 8 of the Act of 1825. The Commissioners "shall have full power and authority and are hereby required" from time to time to make, "amend and maintain" or cause to be made amended and maintained, "and from time to time repaired and kept in repair" all such cuts, drains, etc., as shall in the judgment of themselves and of their engineer be proper and necessary. Again the making of a drain may be discretionary, but the maintenance thereof when made and while in use is obligatory. The defendants have failed both in their duty to do necessary work with reasonable skill and care and in their duty to keep in repair works that have been made and are in use. The work of reopening the channel of the Old Ancholme River was negligently done, with the result that fields 14, 18, and 300 and portion of field 10 have been flooded. The East Drain has not been properly cleansed, with the result that it has become choked and has caused the flooding of the other portion of field 10. An action lies for doing that which the Legislature has authorized, if it be done negligently: *Geddis v. Bann Reservoir Proprietors* (2);

(1) [1920] 1 K. B. 155.

(2) (1878) 3 App. Cas. 430, 456.

and for neglecting those duties which the Legislature has imposed : *Mersey Docks Trustees v. Gibbs*. (1) C. A. 1920

[*Sanitary Commissioners of Gibraltar v. Orfila* (2) and *Robinson v. Workington Corporation* (3) were also cited.]

The Public Authorities Protection Act, 1893 (4), is no protection to the respondents, inasmuch as the injury and damage caused by their neglect and default are continuing : *Earl of Harrington v. Derby Corporation* (5); *Hague v. Doncaster Rural Council* (6); *Attorney-General v. Lewes Corporation* (7); *Rex v. Marshland Smeeth and Fen District Commissioners*. (8)

T. Hollis Walker K.C. and *Sandlands* for the respondents. When a public body is constituted by statute for the performance of certain acts, the nature and extent of the power conferred or the obligation imposed must be ascertained from the particular statute of incorporation. The statute may impose an absolute obligation to do the acts; or it may merely give a discretion to do or abstain from doing the acts according as the statutory body judges necessary or convenient. The powers conferred by the statutes in this case are discretionary. The object of the Legislature was to enable some of the owners of these low-lying lands to enter upon the lands of other owners and construct such sewers and drains as should seem to be for the general benefit of all the owners. The Commissioners are in effect the owners themselves. Such works as they shall think "necessary and convenient," in the words of s. 11 of the Act of 1767, or such as shall in the judgment of themselves or their engineer be "proper and necessary" in the words of s. 8 of the Act of 1825 are to be constructed, repaired, and maintained; not such works as the Court or a jury may think necessary and proper or convenient. The view of the Commissioners as to what works are "necessary and convenient" or "proper and necessary" must be bounded by the line beyond which rates levied upon the owners cease to be a benefit and become a burden. As

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(1) (1866) L. R. 1 H. L. 93.

(2) (1890) 15 App. Cas. 400.

(3) [1897] 1 Q. B. 619.

(4) See headnote.

(5) [1905] 1 Ch. 205, 227.

(6) (1908) 73 J. P. 69.

(7) [1911] 2 Ch. 495.

(8) [1920] 1 K. B. 155.

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long as a drain seems to them necessary and convenient so long they are bound to maintain and repair it, but no longer. The state of their funds may make it inconvenient, even though they might think it desirable, to continue maintaining and repairing or cleansing the drain.

If the statutes impose an obligation and the Commissioners have been guilty of a default, their liability is limited by s. 1 of the Public Authorities Protection Act, 1893. (1) The injurious acts are intermittent and consist of occasional flooding at various times and seasons. The appellants can recover only in respect of flooding which had happened within six months before the issue of the writ: *Carey v. Bermondsey Borough* (2); *Lumley's Public Health* (3) citing *English v. Metropolitan Water Board*. (4)

A special tribunal is provided by s. 38 of the Act of 1767 for assessing and awarding damages to persons who sustain injury to their lands by the neglect or default of the Commissioners. The appellants' remedy, if any, is by way of recourse to that tribunal and not by action at law.

Macmorran K.C. in reply.

Cur. adv. vult.

May 11. The following written judgments were delivered:

BANKES L.J. The respondents are a statutory body created by an Act of 7 Geo. 3 for the purpose (inter alia) of draining certain lands lying in the Level of Ancholme in the county of Lincoln. The action was brought by the appellants for damages for alleged breaches on the part of the respondents of their statutory duties, as a consequence of which the appellants' lands were flooded and damaged. At the trial questions both of fact and law were raised. In a very careful and exhaustive judgment the learned judge who tried the case has disposed of all questions of fact, and has also dealt with the question of damages in such a way as to

(1) See headnote.

(2) (1903) 67 J. P. 447.

(3) 8th ed. (1914), vol. i., p. 971.

(4) [1907] 1 K. B. 588; 76 L. J. (K. B.) 361, 365.

save the parties the expense of any further inquiry into damages. The learned judge has found the facts in the appellants' favour. He has found that part of the flooding complained of was caused as a result of the silting up of the East Drain, and that another part of the flooding was caused as a result of the insufficient reopening of the course of the Old Ancholme River in field No. 285. In regard to these two matters he further finds as follows: "In January, 1916, the Commissioners and their engineer decided that it was necessary, proper, and convenient to open out the Old Ancholme River sufficiently to enable it to receive and carry away the drainage from the culvert under the Owersby Lane, and they left it to their engineer to decide the extent to which the Old Ancholme Road (1) should be opened up across Mickledale. The engineer did in 1916 such work as in his judgment was sufficient to carry out the decision of the Commissioners, and took such measures as he thought necessary and convenient, and did such work as he judged to be reasonably necessary for completing the drainage of such parts of fields 14, 18, and 300 as are within the Level of Ancholme, but in my opinion his judgment was erroneous, and such as a reasonably careful and skilful engineer should not have arrived at."

Upon the facts so found the learned judge gave judgment for the respondents, because he came to the conclusion that upon the true construction of the two material sections of the statutes regulating the powers and duties of the respondents they "are drawn in such a way as purposely to leave the decision as to all matters necessary, convenient, and proper for the drainage of these levels in the hands of the Commissioners, who are an unpaid body of trustees. The effect of these provisions in my judgment is to leave to the statutory body of unpaid commissioners the power to decide what drains and other works should be undertaken and maintained for the purpose of draining the lands in question. There is no absolute duty imposed on them to make all such drains and other works as shall in fact be proper and necessary for

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the drainage of the lands. I have no right to substitute my own for their judgment as to what was necessary, proper, or convenient to be done either by way of original construction or by way of maintenance. They are by their statutes constituted the sole judges, and, whether they and their engineer have decided rightly or wrongly, it is in my opinion impossible to say that they have committed any breach of their statutory obligations so long as they have carried out their own decisions and the joint decisions of themselves and their engineer."

A similar view with regard to the construction of the material statute in that case was taken by Pollock B. in *Forbes v. Lee Conservancy Board*. (1) He expresses his view in these words: "The fair result of what can be said upon both sides of the question appears to me to be this: that the Legislature has, partly for the purpose of the construction of new cuts and partly for the purpose of maintaining the navigation of an ancient navigable river, created a body of trustees without giving them any property in the river, or right to levy tolls for the use of it, and has vested in this body large and important powers, including the power at their discretion to remove obstructions and impediments to the navigation, and that although the trustees would be responsible in damages to one injured by any misfeasance committed by them, or by any non-feasance where the duty imposed was imperative, they are not liable where the matter in respect of which the non-feasance is alleged is one which comes within the scope of their discretion, and as to which they are the persons whose express duty it is to say whether the act should or should not be done." Though each case where it is sought to make a statutory authority responsible for damage caused by any act or omission on its part must depend upon the language of the particular statute setting up the authority, there are I think certain general rules which are applicable to all cases. One of these rules is to be found in the statement of the law by Lord Blackburn in his speech in the case of *Geddis v. Bann Reservoir*

(1) (1879) 4 Ex. D. 116, 121.

Proprietors (1) : “ For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to any one ; but an action does lie for doing that which the Legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, ‘ negligence ’ not to make such reasonable exercise of their powers. I do not think that it will be found that any of the cases (I do not cite them) are in conflict with that view of the law.” In the case of *Levingston v. Lurgan Guardians* (2) Whiteside C.J. says : “ Upon the ultimate decisions in these two cases, *Mersey Docks Trustees v. Gibbs* (3) and *Coe v. Wise* (4), it must, I think, be now taken as established : first, that unless the provisions of the Legislature, by express enactment, or necessary implication otherwise determine, an action for such a wrong as that which is the subject of the present suit lies against a corporation, or public trustees acting gratuitously for public purposes ; secondly, that they are not exempted by the Legislature from this liability, because the legislative provisions which regulate them do not provide funds out of which the damages recovered in an action against them can be paid.” In *Gilbert v. Corporation of Trinity House* (5) Day J. lays down the rule in these general terms : “ The law is plain that whosoever undertakes the performance of, or is bound to perform, duties—whether they are duties imposed by reason of the possession of property, or by the assumption of an office, or however they may arise—is liable for injuries caused by his negligent discharge of those duties. It matters not whether he makes money or a profit by means of discharging the duties, or whether it be a corporation or an individual who has undertaken to discharge them. It is also immaterial whether

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(1) 3 App. Cas. 430, 455.

(2) (1868) 1 R. 2 C. L. 202, 219.

(3) L. R. 1 H. L. 93.

(4) (1864) L. R. 1 Q. B. 711 ;

5 B. & S. 440.

(5) (1886) 17 Q. B. D. 795, 799.

C. A. 1920 BOYNTON v. ANCHOLME DRAINAGE AND NAVIGATION COMMISSIONERS. Bankes L.J.	the person is guilty of negligence by himself or by his servants. If he elects to perform the duties by his servants, if in the nature of things he is obliged to perform the duties by employing servants, he is responsible for their acts in the same way that he is responsible for his own."
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Upon the facts as found by the learned judge there is much to be said for the view that upon these general principles the respondents could be held liable for the damage complained of by the appellants, because the reopening of the course of the Old Ancholme River was in substance the making of a new work by the respondents under the authority of Parliament, which work was negligently executed ; and with regard to the cleansing of the East Drain it was a duty undertaken by the respondents under their statutory powers, which they negligently performed. It is not necessary however to decide this appeal on these grounds, because I am not able to take the same view of the construction of the material sections of the statutes of 1767 and 1825 as was taken by the learned judge. In my view the discretion vested in the respondents, or in the respondents jointly with their engineer, is a discretion as to what work shall be executed, and probably as to what works shall be wholly abandoned. When once a work has been made, and until it is abandoned as part of the drainage system, both statutes appear to me to place the respondents under the express obligation to maintain and repair it. For these reasons I am of opinion that on this part of the case the appeal succeeds. •

It is said however that even assuming this view to be correct, the action is not maintainable, because the statute of 1767 creates an exclusive remedy to which the appellants must have recourse. I do not agree with this construction of the material section, which appears to me to apply only to an assessment of damage where the liability is not in dispute. The section deals only with an inquiry and ascertainment of damages by a jury and the entry of judgment for the party aggrieved.

The last point taken by the respondents has reference to the application of the Public Authorities Protection Act,

1893. It is contended for the respondents that the case is not one where the injury or damage has been continuing, because the floods complained of have not been continuous, but only intermittent, and that as a consequence only the damage occasioned within six months of the commencement of the action can be recovered. Our attention was not specially called to any evidence bearing upon this point, but I notice that the learned judge has awarded damages not only for the damage to crops, which may be of an intermittent nature, but for injury to the soil, which in the case of constantly recurring floods would be continuous. As therefore the negligent acts or omissions on the part of the respondents and the damage resulting therefrom appear to have been continuous during the whole period for which the learned judge has awarded damages, I think this point fails also. The appeal is allowed and the judgment for the respondents set aside and judgment entered for the appellants—I have not included the amount, because it may be a matter for discussion—with costs here and below.

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SCRUTTON L.J. The question in this case is whether on certain facts found by Greer J. there is any legal liability on the Commissioners for the Ancholme Navigation in respect of certain flooded lands in the Level of Ancholme.

The judge below in his very careful and accurate judgment finds two causes of flooding : (1.) that as to field 10 the water did not run away owing to accumulation of sand in the East Drain blocking up the mouth of an old culvert draining between fields 10 and 14. He finds this to be due to inadequate cleansing of the East Drain—cleansing not done often enough, and not thoroughly done, though it was done as the engineer to the Commissioners thought necessary. (2.) As to fields 18 and 300, that they were flooded because the Old Ancholme River which had once received the drainage from these fields, but had been partially filled up, was not opened up to a depth sufficient to drain them, though the Commissioners had ordered their servants to reopen the old channel. The judge finds that this failure to open to a

C. A. sufficient depth was due to lack of reasonable care and skill
 1920 on the part of the Commissioners' engineer, though he did
 BOYNTON what he honestly thought was sufficient. On these findings
 v. the defendants argued, and the judge has found, that
 ANCHOLME no liability was imposed on them by their special Acts,
 DRAINAGE as they and their servants had done what they honestly
 AND thought was sufficient, and the matter was left to their
 NAVIGATION discretion.
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There is no doubt that there is a class of statutes where public bodies perform duties for the consequences of which there is no liability if they honestly use their discretion in performing them. *Forbes v. Lee Conservancy Board* (1) is an instance of this discretionary duty, as are some of the decisions under the Lunacy Acts. The tendency at one time was to free unpaid bodies of public trustees from such liability, as in *Sutton v. Clarke*. (2) But this view of the liability of public bodies was rendered very difficult by the decision of the House of Lords in *Mersey Docks Trustees v. Gibbs* (3), in which the previous cases were exhaustively reviewed. It is not profitable to consider cases decided on different statutes, as the question turns on the language of the particular statute in each case. In my view, where a duty to do a work is imposed by statute on a corporate body, there will generally follow a liability to pay damages caused by negligence in doing that work. But it turns on the statute in each case. In *Coe v. Wise* (4) the Commissioners for the Middle Level of the Fens were held liable for negligence in making and maintaining a drain, the statute containing a clause that they "shall make and maintain" the drain in question. The same result followed from the same language in *Collins v. Middle Level Commissioners*. (5) In the present case by s. 8 of the Act of 1825 the Commissioners were "required" to maintain and keep in repair all such drains as they or their engineer should think proper or necessary for completing the drainage of the lands lying in the Ancholme Level. I

(1) 4 Ex. D. 116.

(2) (1815) 6 Taunt. 29.

(3) L. R. 1 H. L. 93.

(4) L. R. 1 Q. B. 711; 5 B. & S. 440.

(5) (1869) L. R. 4 C. P. 279.

desire to reserve the question whether, if the Commissioners decided not to make a particular drain, they could be held liable for damages following from that decision ; but I am of opinion that where they have decided to make a particular drain, negligence in maintaining or repairing it, which causes damage, gives a cause of action against the Commissioners. The section of the Act of 1767 which gives a particular remedy against the Commissioners for damages sustained by any neglect or default of the Commissioners, their agents, workmen, or servants, appears to recognize this liability. I therefore cannot agree with the view of the judge below that this is one of the discretionary class of statutes where an action does not lie against Commissioners who have themselves or by their servants exercised, but negligently exercised, their discretion.

Since I wrote this judgment, and, I believe, since my brothers have written their judgments, our attention has been called to a decision of the Irish Court of Appeal in *Bohan v. Clements*. (1) In that case also the Court of Appeal in Ireland have imposed a liability on trustees of drainage works for negligence in not maintaining a drain. The words of the statute are somewhat different, and the facts found in the special case on which the decision proceeded are also somewhat different, but as far as I have been able, in the time at my disposal, to consider the case, it appears to agree with the conclusions at which we, without knowing of the existence of the decision in the Irish Court of Appeal, have arrived.

The second point taken was that a remedy was given by the clause of the statute referred to—namely, a claim to a jury presided over by five of the Commissioners accused of negligence. It was said that this was a case of a new statute giving a new remedy, which alone could be pursued : see per Lord Esher in *Reg. v. Essex County Court Judge*. (2) I am not clear that this applies where the new remedy is in a different clause from that creating the liability : see per Charles J. in *Reg. v. Hall* (3), approving Ashhurst J. in *Rex v.*

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(1) [1920] 2 I. R. 117.

(2) (1887) 18 Q. B. D. 704, 707.

(3) [1891] 1 Q. B. 747, 767.

C. A. *Harris*. (1) But I think an examination of the section relied
 1920 on shows that it is confined to the assessment of damage
 where liability is admitted. It cannot have been intended
 to make the persons accused of negligence the judges to
 direct a jury on the question of their liability ; at any rate I
 do not propose to oust the jurisdiction of the King's Courts
 without clear words compelling me to do so ; and here I
 find no such words.

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Lastly, it was said that the Public Authorities Protection Act, 1893, prevented an action being brought for damage accruing more than six months before the commencement of the action. The Act provides that in case of a continuance of injury or damage the action must be brought within six months after the ceasing thereof. The Court of Appeal in *Carey v. Bermondsey Borough* (2) held that these words meant, in case of continuance of the act which caused the damage. Where what is complained of is a continuing neglect to do something which may cause damage until the neglect is remedied, I think time does not begin to run till the neglect ceases. Here in one case there was neglect to clear out and repair a drain, the obstruction continuing ; in the other case continuing neglect to reinstate an old drain, the obstruction not cleared out continuing and causing flooding. This statutory defence therefore fails.

The damages recoverable on the assessment of the judge appear to be (I mention these figures provisionally so that counsel may check them) : 238*l.* in respect of field 10, i.e., 48*l.* plus 150*l.* plus 40*l.* ; 105*l.* in respect of fields 18 and 300, i.e., 95*l.* plus 10*l.* ; 46*l.* in respect of field 14, i.e., 36*l.* plus 10*l.* ; being 389*l.* in all, for which I think judgment should be entered for the appellants with costs here and below.

ATKIN L.J. When the issues raised in this case have been completely examined the matter in controversy is reduced to a small compass. In my opinion s. 8 of 6 Geo. 4, c. clxv., imposes upon the Commissioners an absolute obligation to maintain, repair, and keep in repair such drainage works as

(1) (1791) 4 T. R. 202.

(2) 67 J. P. 447.

in the judgment of themselves and their engineer are proper and necessary for the drainage of the Ancholme Level. It is clear from the evidence that both the Commissioners and their engineer considered both the East Drain and the old course of the Ancholme in field 285 to be proper and necessary works for such drainage. As long as the Commissioners and their engineer continued to consider these to be necessary works, the duty to keep them in repair existed; and I see nothing in the statute to limit that obligation to such repairs as the Commissioners and their engineer shall think fit. On this short ground I think that it follows from the findings of the learned judge that the appellants were entitled to succeed.

I agree that the Public Authorities Protection Act, 1893, does not assist the defendants. On the narrowest construction of the Act damage accrued to the appellants from time to time by reason of the continuing omission of the defendants to maintain and keep in repair the works in question, and this would be a case of a continuance of injury or damage. As in such a case an action may be brought against a public authority within six months next after the ceasing of the continuing injury or damage, it seems plain that it can be brought at any time between the beginning and the ceasing thereof, always subject to the six years' period of limitation. Even if the act or omission complained of were not continuing, but the injury resulted from single acts of the defendants—namely, the failure to use reasonable care in the one case in cleaning out the East Drain, and in the other in restoring the course of the Old Ancholme—yet I think that the negligent acts would be actionable, as the negligent performance of a statutory duty; and the damage would be continuing, and the appellants could recover damages for the last six years. There would be a separate cause of action each time the appellants' land was injured. "A man stores water artificially, as in *Fletcher v. Rylands* (1); the water escapes and sweeps away the plaintiff's house; he rebuilds it, and the artificial reservoir continues to leak and sweeps

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(1) (1865) 3 H. & C. 774; Cam. *Rylands v. Fletcher* (1868) L. R. 3 Scacc. (1866) L. R. 1 Ex. 265; H. L. H. L. 330.

C. A. it away again. Cannot the plaintiff recover for the second
 1920 house, or must he have assessed in his first damages the
 BOYNTON possibility of any further invasion of water flowing from the
 v. same reservoir? ” That is a quotation from *Darley Main*
 ANCHOLME *Colliery Co. v. Mitchell*. (1) Lord Halsbury thought it
 DRAINAGE unnecessary to supply the answer to his question.
 AND
 NAVIGATION I agree with what has been said in the judgments just
 COMMIS- delivered on the point as to the special remedy given by the
 SIONERS. first statute.
 ———
 Atkin L.J.

I desire to add that it would have been impossible to deal thus shortly with this case, but for the masterly handling by the learned judge of the complicated issues which he had to try. As the result of his judgment the only question decided by him capable of subsequent controversy is the question of construction, on which I have felt bound to give effect to a different view.

Appeal allowed.

Solicitors for appellants : *Neave, Morton & Co., for Wilkin & Chapman, Grimsby.*

Solicitors for respondents : *Collyer-Bristow & Co., for Hett, Hett & Davy, Brigg.*

(1) (1886) 11 App. Cas. 127, 133, 134.

W. H. G.

[IN THE COURT OF APPEAL.]

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H. AND C. SMITH, LIMITED *v.* GREAT WESTERN
RAILWAY COMPANY.

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Oct. 27, 28

Nov. 15.

*Railway — Carriage of Goods — Special Contract — Owner's Risk — Wilful
Misconduct — Loss of Goods — Inference from Conduct.*

Certain traders delivered to a railway company a parcel containing six pairs of boots of the value of 10*l.* 11*s.* 6*d.* and weighing 19 lbs. for carriage by the company from Birmingham to Wilton, near Salisbury, on the terms that the company should not be liable for loss, damage, misconveyance, misdelivery, delay or detention except upon proof that the loss, damage, &c., arose from the wilful misconduct of the company's servants. The parcel was never delivered to the consignee. When nineteen days had passed the traders wrote to the company to complain and were told that their complaint would have immediate attention. They heard no more for three months. Then in answer to a letter from their solicitor asking by whom and when the parcel was or should have been handled and what had become of it, they were told that the matter should receive immediate attention. A fortnight later the solicitor wrote threatening proceedings unless he received by return of post some account of what had happened to the parcel, and the company replied that the reason of the delay in the case was that the whole of the papers had been lost in transit, and that as soon as possible a definite reply would be given. A week later the traders brought an action in the County Court. In answer to interrogatories the defendants stated that inquiries had been made but that they had no knowledge as to whether the parcel had been dispatched from Birmingham or received by their servants at Wilton; that there was no record of its having been so received; and that they believed that it was lost, that it never arrived at Wilton, and was never delivered or tendered to the consignee. At the trial in the County Court the defendants offered no evidence, but contended that they had no case to answer, inasmuch as no evidence of wilful misconduct had been given against them:—

Held, by Bankes and Scrutton L.JJ. (Atkin L.J. dissenting), that the plaintiffs had failed to prove that the loss of the parcel arose from the wilful misconduct of the defendants' servants.

Curran v. Midland Great Western Ry. Co. of Ireland [1896] 2 I. R. 183 considered.

Judgment of Divisional Court affirmed.

APPEAL from the judgment of a Divisional Court on appeal from the County Court of Warwickshire holden at Birmingham.

The plaintiffs had entered into an agreement in writing with the defendants for the carriage of goods. It was headed "General agreement for perishable and other goods to be

C. A. carried by passenger train or by other similar service at
1920 owner's risk." It contained the following clause: "In
SMITH, LD. reference to the above we request that all goods for which
G. W. RY. v. there are alternative rates by passenger train or other similar
Co. service delivered by us or on our account at any of your
stations for carriage by railway may be carried at the lower
rate (where and so long as such rate exists) except when
specially consigned at the higher rate; and in consideration
of your charging such lower rate we agree to relieve you from
all liability for loss, damage, misconveyance, misdelivery,
delay or detention of or to such goods or a trader's truck or
sheet (if any) containing or covering them, except upon
proof that such loss, damage, misconveyance, misdelivery,
delay or detention arose from the wilful misconduct of your
servants."

On July 5, 1919, the plaintiffs brought the action against the defendants in the county court. The particulars of claim stated that "On February 15, 1919, the plaintiffs delivered to the defendants one parcel containing six pairs of men's boots in order that the same might be carried for reward and delivered by the defendants to the consignee, H. Daniels, 1 North Street, Wilton, Salisbury, Wilts. The defendants so received the said goods but they did not carry them or so deliver them but wholly failed to deliver and lost them in consequence whereof the plaintiffs have been deprived of the said goods and have lost their value, 10*l.* 11*s.* 6*d.*."

The following facts appeared: The parcel of boots was properly packed and addressed to H. Daniels, 1 North Street, Wilton, Salisbury. It contained six pairs of men's boots of the value of 10*l.* 11*s.* 6*d.* and weighed 19 lbs. It was delivered to the defendants at Birmingham on February 14, 1919. The railway collecting sheet was signed by a man named Moss who was the servant collecting for the defendants. The parcel was traced to the defendants' collecting office at Snow Hill Station, Birmingham, but no further. It was never delivered to the consignee. On March 4 the plaintiffs wrote to the defendants describing the parcel and saying "The above are contents of parcel handed to you February 15.

Moss signs; addressed Mr. H. Daniels, 1 North Street, Wilton; Salisbury, Wilts, but has not been delivered to addressee; apparently lost in transit. Your early settlement will oblige."

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Co.

The defendants replied on March 5: "Your letter of the 4th inst. in reference to parcel consigned to Daniels of Wilton has been received and the matter shall have immediate attention." In June the plaintiffs placed the matter in the hands of their solicitor who wrote to the defendants on June 6 mentioning the plaintiffs' claim and adding: "I understand my clients have already communicated with you on the matter, and that the parcel was properly packed and handed to your company's servant whose receipt my clients hold for the same. Will you please let me know by whom and when the said parcel was or should have been handled and what has become of it as it is necessary for my clients to make a claim against your company in respect of its non-delivery."

The defendants replied on June 7: "Your letter of the 6th inst. in reference to Messrs. H. C. Smith's claim 10*l.* 11*s.* 6*d.* has been received and the matter shall have immediate attention." On June 27 the plaintiffs' solicitor wrote: "Referring to my letter of the 6th inst. and to your acknowledgment dated the 7th inst., unless I hear from you by return of post with some account of what has happened to this parcel I shall institute proceedings without further notice." On June 28 a letter was written on behalf of the defendants: "I regret to inform you that the reason of the delay in this case is because the whole of the papers have been lost in transit. The case is however being worked up again and as soon as possible a definite reply shall be given. Yours faithfully S. F. Johnson." On July 5 Mr. Johnson wrote again asking for a copy of the letter of March 4; and on July 7 the plaintiffs' solicitor wrote sending the copy asked for and adding: "I may say however that as the matter was not settled I have already issued a county court summons. It is a pity you have lost the papers. Apparently no more care was taken of these than of the parcel, the value of which my clients are claiming."

C. A. The plaintiffs administered certain interrogatories which
1920 were accepted as formal interrogatories by consent. In their
SMITH, LD. answer to the first interrogatory the defendants admitted
v. that they had received the parcel. The second interrogatory
G. W. RY. and the defendants' answer thereto were as follows: "On
Co. what date and at what time was the parcel referred to in the
first interrogatory: (a) dispatched by the defendants to
Birmingham? (b) received by the defendants their servants
or agents at Wilton? (c) delivered or tendered by the
defendants their servants or agents to the consignee?" The
answer was "Inquiries have been made, but the defendant
company have no knowledge or means of knowledge:—
(a) as to whether the said parcel was dispatched from
Birmingham; (b) as to whether the said parcel was received
by the defendant company, their servants or agents at Wilton:
there is no record of such receipt; (c) as there is no record
of the said parcel being received at Wilton, it is believed
the same is lost, never arrived at Wilton, and was never
delivered or tendered to the consignee." The defendants'
affidavit of documents made no mention of any documents
as having been in the defendants' possession but which could
not be produced because they were lost; it stated that the
defendants had in their possession or power a number of
documents including a consignment note undated; letters
written by the plaintiffs to the defendants, between August 22,
1918, and April 15, 1919; and letters written in May, 1919,
from the plaintiffs' solicitor to the defendants and from the
defendants themselves and their solicitor to the plaintiffs'
solicitor.

At the trial in the county court the plaintiffs proved the terms of the contract of carriage and proved that the goods had been properly packed and delivered on their premises to the defendants' servant, and they proved the correspondence set out above, and put in the answers to the first and second interrogatories. The defendants called no evidence, but submitted that there was no case for them to answer as no evidence of wilful misconduct had been given against them.

The county court judge decided in favour of the plaintiffs.

He concluded his judgment with these words: "I must look at the whole of the circumstances which may be equally consistent with one or more theories. If any one of these theories is adopted which would relieve the railway company from liability under the contract the claim certainly could not succeed, but if there is evidence strongly preponderating in favour of one of those theories which in the absence of reasonable explanation by the company would fix them with liability, I am entitled to act upon it. There is, in my opinion, evidence here which justifies me in finding as I do wilful misconduct on the part of the defendants, and I direct accordingly that judgment shall be entered for the plaintiffs for the amount claimed."

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On appeal the Divisional Court (Salter and Roche JJ.) reversed this judgment and entered judgment for the defendants.

The plaintiffs appealed.

R. A. Willes for the appellants. This is the case which was left open by Scrutton L.J. in *Smith v. Midland Ry. Co.* (1). The whole parcel has disappeared. That is prima facie evidence of wilful misconduct on the part of the respondents: *Curran v. Midland Great Western Ry. Co. of Ireland.* (2) The respondents called no evidence to rebut this presumption of fact; such replies as they condescended to make to inquiries were very unsatisfactory; for example, that they had lost all the papers relating to the parcel, a statement which is not borne out by their affidavit of documents. So far from rebutting, their conduct corroborates the presumption. The Court must look at all the facts in the case, including the fact that no explanation is forthcoming from the persons who have the means of knowledge. If those facts make it probable that misconduct rather than mishap caused the loss of this parcel, the county court judge was justified, if indeed he was not bound, to find for the appellants: *Vaughton v. London and North Western Ry. Co.* (3); *Mitchell*

(1) (1918) 88 L. J. (K. B.) 868, 871.

(2) [1896] 2 I. R. 183.

(3) (1874) L. R. 9 Ex. 93.

C. A. v. *Glamorgan Coal Co.* (1); *Fleet v. Johnson.* (2) If there is
 1920 any evidence to support the finding of the county court
 SMITH, LD. judge the finding must stand.

v. *Disturnal K.C.* and *Bartley* for the respondents. The
 G. W. RY. appellants cannot succeed unless they prove a loss by the
 Co. wilful misconduct of the respondents. The evidence is quite
 consistent with a loss by theft by some person not a servant
 of the respondents, or by misdelivery through inadvertence.
 The appellants only attempt to prove misconduct after the
 loss of the goods. They fail to do even this; but if they
 succeeded it would not avail them. The facts in *Curran's*
Case (3) may have warranted the inference drawn by
 Palles C.B. that the pigs were at the date of the writ alive
 and in the possession of the defendants. If so, only one
 conclusion was possible. Each case must depend on its
 own facts, and the facts in the present case are very different
 from those in *Curran's Case.* (3)

R. A. Willes in reply.

Cur. adv. vult..

Nov. 15. The following written judgments were delivered:

BANKES L.J. In this case the plaintiffs in the action appeal
 against a decision of the Divisional Court reversing the judg-
 ment of the county court judge in their favour. The claim
 was for the value of a parcel of boots consigned by the
 appellants by the respondents' railway from Birmingham to
 Wilton. The parcel never arrived, and the appellants
 contend that the county court judge was right in deciding
 that they had given sufficient evidence to justify his finding
 in their favour. Mr. Willes has argued the appellants' case
 with great thoroughness and ingenuity but he has failed to
 satisfy me that his clients are entitled to succeed. Some of
 the points which he raised are not, in my opinion, open to
 him, having regard to the form of the action, and the way
 in which the case for the appellants was presented in the
 county court. The parcel was delivered to the railway

(1) (1907) 23 Times L. R. 588.

(2) (1913) 6 B. W. C. C. 60.

(3) [1896] 2 L. R. 183.

company for carriage at owners' risk upon the terms of a special contract entered into between the appellants and the railway company. This contract provides that in consideration of the conveyance of goods by passenger train at the lower rate the consignor agrees to relieve the railway company from all liability for loss, damage, misconveyance, misdelivery, delay or detention of the goods, except upon proof that such loss, damage, misconveyance, misdelivery, delay or detention arose from the wilful misconduct of the railway company's servants.

[After referring to two points which counsel for the appellants had argued but which the Court held were not open to him, not having been raised in the county court, the Lord Justice proceeded:]

I pass now to consider the point which was taken in the county court, and which both the county court judge and the Divisional Court have considered and given judgment upon. It is whether the evidence laid by the appellants before the county court judge was such as to justify an inference that the parcel was lost owing to the wilful misconduct of the railway company's servants. If there was evidence upon which the learned county court judge could properly draw that inference this Court cannot interfere with his decision. The learned judge, in my opinion, directed himself quite correctly when in discussing the various theories which might account for the loss of the parcel he said: "If there is evidence strongly preponderating in favour of one of such theories which, in the absence of reasonable explanation by the company, would fix the defendants with liability I am entitled to act upon it." That legitimate inference from established fact is evidence for the purpose of applying the above direction to the present case is, I think, clear beyond doubt. See the observations of Lord Shaw in *Kerr v. Ayr Steam Shipping Co.* (1), and of Lord Loreburn in *Swansea Vale (Owners) v. Rice* (2), which were applied in the recent cases of *Bird v. Keep* (3) and *Munro Brice & Co. v. Marten*. (4) In *Smith v.*

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(1) [1915] A. C. 217, 233.

(2) [1912] A. C. 238, 239.

(3) [1918] 2 K. B. 692.

(4) [1920] 3 K. B. 94.

C. A. *Midland Ry. Co.* (1) the appellants recently succeeded in this
 1920 Court in discharging the onus of proving wilful misconduct by
 SMITH, LD. means of inferences from the facts there proved. Although
 v. the learned judge of the county court was undoubtedly
 G. W. Ry. entitled to draw inferences from the facts proved before him,
 Co. the inferences must be such as could legitimately be drawn
 Bankes L.J. from the facts. If the facts are such that no reasonable
 man could draw a particular inference from them, or if the
 particular inference is such as to be equally consistent with
 non-liability and with liability, then the party who relies
 on the inference to discharge the onus of proof of establishing
 liability fails. See *Wakelin v. London and South Western*
Ry. Co. (2); *Pomfret v. Lancashire and Yorkshire Ry. Co.* (3)
 In the last mentioned case the then Master of the Rolls
 states the rule thus: "The burden, and the whole burden,
 of proving the conditions essential to the obtaining an award
 of compensation, rests upon the applicant and upon nobody
 else, and if he leaves the case in doubt as to whether those
 conditions are fulfilled or not, where the known facts are
 equally consistent with their having been fulfilled or not
 fulfilled, he has not discharged the onus which lies upon him."
 A. L. Smith J. was, in my opinion, applying this rule quite
 correctly to the facts of the case he was dealing with, when
 he made the observations on the evidence in *Stevens v. Great*
Western Ry. Co. (4) which are criticised by the learned county

(1) 88 L. J. (K. B.) 868.

(2) (1886) 12 App. Cas. 41, 45.

(3) [1903] 2 K. B. 718, 721.

(4) (1885) 52 L. T. 324, 326. The passage referred to from the judgment of A. L. Smith J. is as follows:—"I am of opinion he"—the learned judge—"could have nonsuited the plaintiffs, and for this reason: it seems to me that those facts are perfectly consistent with the goods having been misdelivered either from pure inadvertence or in consequence of the negligence or by the wilful default of any one of the company's servants. Inasmuch as it

seems to me the onus of proof is upon the plaintiffs to prove that the loss or delay did occur from wilful misconduct on the part of the company's servants, I think the plaintiffs make out no case when they simply say the case before the Court is consistent with those three hypotheses. Then how is the judge to say, 'You have satisfied me that the delay occurred by wilful misconduct,' when it may have occurred from inadvertence or from mere negligence? It seems to me the plaintiffs have not supported the burden of proof which they undertook, and which they must

court judge in his judgment. The evidence of what happened to the parcel in question stopped at a very early stage on the journey. It was proved that it was delivered to the railway company's carman at the appellants' place of business, and it was, I think, also proved that the carman delivered it to the parcel office at Birmingham, whence it ought to have been dispatched to Wilton. The parcel was never delivered to the consignee, but there was no evidence as to what happened to it after it reached the parcel office. Mr. Willes, I think, admits that if his case had stopped there, the appellants would not have given any evidence from which the learned county court judge could have legitimately drawn the inference that it was lost through the wilful default of the railway company. He also admits, I think, that he cannot get any assistance from the fact that the railway company elected not to call any evidence. He relies, and relies mainly, upon the letters written by the railway officials and servants and upon the affidavit of documents, as supplying the evidence from which the inference of wilful default may legitimately be drawn. I do not at all dispute the proposition that a railway company, or anyone else, when charged with the loss of some article entrusted to their charge, may so behave themselves that from their words or deeds an inference that the loss was due to wilful misconduct may legitimately be drawn. In my opinion no such inference can or ought to be drawn in the present case—I include ought to be drawn, because in his argument in this Court Mr. Willes undoubtedly imputed a want of good faith to the officials and servants of the railway company, a charge which if made in the county court obviously called for an answer. I have read the proceedings carefully, and I am satisfied that no such charge was made in the county court. It ought, therefore, not to be made in this Court, and the appellants cannot succeed upon a view of the correspondence which imputes bad faith. Apart from this point altogether, I see no justification for the charge being made, or for the suggestion that the correspondence

undertake, in order to substantiate their claim against the railway company."

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and the affidavit of documents support the inference of wilful default. The railway company do not appear to me to have been desirous of giving the appellants more assistance in establishing their claim than they were obliged to give, and they were undoubtedly unbusinesslike and dilatory in their methods of dealing with the appellants' complaint. Many inferences may be drawn from this state of facts, but I cannot find anything that, to use the learned county court judge's expression, preponderates in favour of an inference of loss from wilful default. The first notice of a claim is on March 4, 1919, nineteen days after the parcel was handed to the railway company, and well outside the time limit for a complaint under condition 3 of the special contract. The fact that the railway company did not insist upon this condition is, I consider, worthy of attention. This complaint is replied to on March 5 by a formal letter from the parcels department, Birmingham, saying that the matter should have immediate attention. No further communications passed until June, when the appellants placed the matter in the hands of their solicitor, and he wrote on June 6 asking for information as to when and by whom the parcel should have been handled and what had become of it. This letter appears not to have elicited more than a formal reply, and the solicitor wrote again on June 27 threatening proceedings. This letter brought a reply on the following day, upon which Mr. Willes has laid great stress. The writer states that the reason of the delay in this case is because the whole of the papers have been lost in transit. Mr. Willes does not hesitate to suggest bad faith in connection with this letter, and he refers to the affidavit of documents to support the suggestion, and points out that no reference is there made to any document which had been in the railway company's possession but had been lost. If the suggestion had been made in the county court the matter could have been investigated and cleared up one way or the other. As matters stand the evidence, such as it is, appears to support the suggestion that though the documents may have been lost on June 28, they were recovered before September 15, on which date the affidavit of documents

was sworn, and were inserted in the affidavit as being in the possession of the railway company. The only assistance that I can get from the documents on this point is derived from the fact that on July 5 the railway company are writing for a copy of the demand note, which presumably was at that time missing, and yet the original is included in the affidavit of documents. Shortly after this letter was written the plaint was issued, and the correspondence proceeds between the solicitors without the slightest indication that the solicitor for the appellants doubted, or had any reason to doubt, the good faith of the railway company's servants or officials in writing the letters which have been referred to. Indeed the solicitor's letter of July 7 complains of the carelessness of the company's servants in losing the papers. There are, in my opinion, no materials in this case upon which a charge of bad faith against the railway company can be sustained. In the absence of any evidence of bad faith the evidence adduced for the appellants is not, in my opinion, capable of the inference that the parcel must have been lost owing to the wilful misconduct of the company's servants. The evidence leaves the question entirely open as to the cause of the loss. It may have been due to wilful default of the company's servants, or to negligence on their part, or to theft by some one not in the company's service at all. In the absence of any evidence rendering the first of these causes more probable than either of the others the appellants have, in my opinion, failed to discharge the onus of proof which by the terms of the special contract they had taken upon themselves. Before referring to the case of *Curran v. Midland Great Western Ry. Co. of Ireland* (1) on which so much reliance was placed in the Court below and in this Court, and on which the learned county court judge bases his decision, I think it desirable to emphasize the point that both in *Curran's* case (1), and in the present case, the rights and obligations of the parties respectively must be looked for in the special contract into which they had entered. In the present case the appellants have, in my opinion, definitely agreed in

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(1) [1896] 2 I. R. 183.

C. A. certain events enumerated in the contract, that the railway
1920 company should not be held responsible except upon proof
SMITH, LD. by the appellants that what they were complaining of was
v. due to the wilful default of the railway company. The
G. W. Ry. contract in *Curran's Case* (1) was differently worded to that
Co. in the present case, and curiously enough it does not raise the
Bankes L.J. question of wilful default in relation to the loss of an animal
but only in relation to injury or delay. As printed in the
report the contract gives the railway company complete
immunity from liability for the loss of an animal. I hesitate
to say a word in criticism of any judgment of Palles C.B., but
as reported he does appear to me to have, to a great extent,
lost sight of the existence of the contract and to have reasoned
out his decision upon lines which are more applicable to the
case of an ordinary bailee for hire than to the case of a contract
such as the one we are considering in the present case. In
any case where a decision rests upon an inference from facts,
the question whether the inference was properly drawn must
depend upon the particular facts of the case. It is only
necessary to contrast *Curran's case* (1) with the present case
to see that it must be so. A very different inference may
have to be drawn from the mere fact of the loss of a live pig
in transit, than from the mere fact of the loss of a parcel
weighing 19 lbs. It is difficult to conceive of a thief uncon-
nected with the railway company's service being able to carry
away a live pig; on the other hand a live pig may under
certain conditions run away of its own volition and be lost,
a feat which a parcel, even though it contain boots, is unable
to perform. Similarly a very different inference may have
to be drawn where the transit is direct from one station to
another situate within a few miles of each other, which does
not involve any transshipment, and a transit involving many
transshipments, occupying a long time and covering a long
distance. Palles C.B. in the reasoning he applied to the
case he was dealing with apparently refused to recognise
the last distinction. It is not at all necessary to suggest
that upon the facts of *Curran's Case* (1) the conclusion arrived

(1) [1896] 2 L. R. 183.

at by the Chief Baron was not justified. All that I desire to say about the case is that I do not consider it an authority which is of any real assistance in dealing with the facts of the present case, which I regard as a very special one, in that the appellants have throughout accepted the position that the parcel was lost whilst in the course of transit, that the case was covered by the special contract, and that the onus lay on them of proving that the loss was due to the wilful default of the company's servants. Whether it may not be possible in some future case, by putting a railway company to the proof of a special contract, and to the existence of circumstances rendering it applicable to the claim, to compel them to disclose what, as far as they can ascertain, has happened to a missing article, I express no opinion. It is sufficient to say that that is not this case. In my opinion the appeal fails and must be dismissed with costs.

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SCRUTTON L.J. The Great Western Railway Company offer to persons who desire to send parcels by them two alternative rates. By one the railway company takes certain risks on itself; by the other, called the owner's risk contract, the railway company takes less risks, and the goods owner pays a smaller sum for carriage, because he agrees to relieve the company "of all liability for loss, damage, misconveyance, misdelivery, delay or detention of or to goods except upon proof that such loss etc. arose from the wilful misconduct of your servants." The effect of this is that if he sues on the contract alleging the goods are lost, the goods owner must prove wilful misconduct of the company's servants. In the present case Messrs. H. C. Smith, Ltd., alleged failure to deliver and loss of certain boots. At the close of the plaintiffs' case the company submitted that no case of wilful misconduct was proved, and called no evidence. The county court judge found wilful misconduct proved, and gave judgment against the company. On appeal the Divisional Court reversed this decision and the goods owner appeals.

It is to be noted that the appeal being from a county court judge, who is the sole judge of fact, the question is not whether

C. A. this Court on such evidence as there was would have come to
1920 the same conclusion, but whether there is any evidence which
SMITH, LD. could reasonably, if accepted, be the basis of such a conclusion.
v.
G. W. RY. If there is, it is immaterial that this Court might not have
Co. drawn such a conclusion from that evidence. Oddly enough
Scrutton L.J. there is some little doubt as to what evidence the county
court judge considered. It looks as if he treated the case
as one where the parcel in question was handed to the railway
company's carter, and there was no subsequent trace of it,
the railway company saying they had no knowledge or means
of knowledge how the parcel was lost. He says in his
judgment, "All trace of this parcel beyond the time when
it was delivered to the company's servant has been lost."
Before the Divisional Court, however, counsel agreed that
this was inaccurate, and that the parcel was traced from
the company's carter to the company's collecting office at
Snow Hill, Birmingham. Presumably the county court
judge at Birmingham and the experienced counsel practising
at Birmingham knew something about that office without
evidence. This Court does not, and does not know whether
parcels arriving there are in a locality to which outsiders
have ready access or not. If I may draw on my own
experience of collecting offices, in some the parcels lie at large
about the station and the public walk among the parcels ;
in others the public cannot get near the parcels, which have
been handed over the counter. No evidence as to the
Birmingham office was given in the county court. The railway
company disclosed that there was a "counter book" in this
office containing a relevant entry, but neither party put it
in. Nor was there any evidence as to the ordinary course
of business when a parcel went out of the collecting office,
as to way-bills, or entries in the collecting book, and what,
if anything, was shown by the counter book in this case.
The parties were manœuvring for position, rather than telling
all they knew. The goods owner put as his case : "I have
traced the boots into the hands of the company's servants ;
they do not deliver them, and will tell me nothing about them,
and I ask the Court to find that they have lost them by wilful

misconduct of their servants." The company says: "You say the goods are lost; we cannot trace them; and, as there is no evidence whether they were lost by thefts of our servants, or theft by outsiders, or the negligence of our servants in misdelivery or otherwise, you have not proved your case."

In my opinion it is impossible to lay down any general rule as to the facts from which one can infer in the absence of explanation of loss, "loss by wilful misconduct of the company's servants." It must depend on the nature of the subject matter and of the stage of the transit reached in each particular case. For instance, if the company were carrying an elephant and would say nothing as to why it was not delivered; as an elephant can hardly disappear without a company's servant knowing of it, one would easily find that it was lost either by wilful misconduct of the company's servants, or by their wilfully not at once informing some superior that it had disappeared when it could easily be traced and recovered. On the other hand if a small parcel disappeared from a place to which both the company's servants and outsiders had free access, in a time of great pressure of business, it would be impossible to draw any inference as to what had really happened. And there might be many intermediate cases of great complexity and difficulty. In an action by the same goods owner against the Midland Railway Company (1) this Court felt able to find wilful misconduct of the company's servants from the fact that part of the contents of a parcel had disappeared, the parcel having been opened, repacked with rubbish, and done up again. In such a case such an operation must have taken some time, and have been carried out on the company's train by a person who could calculate on being free from disturbance for the considerable time taken in unpacking and repacking, facts which pointed strongly to theft by a servant of the company.

In the present case the parcel weighs 19 lbs., and contains six pairs of boots. It is therefore of a portable size and weight, but not inconspicuous. It has entirely disappeared,

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C. A. being last seen in an office of the company—as to which there
 1920 is no evidence how far the public have access to it. The
 SMITH, LD. parcel may have started on a train journey, but there is no
 v. evidence as to whether in that case there should be any
 G. W. RY. records of its starting. I suspect the company's servants
 Co. stole it ; but on the best consideration I can give to the matter,
 Scrutton L.J. I do not think there [is] any evidence on which it can be
 reasonably found that the company's servants stole it, as
 contrasted with theft by outsiders, or loss by negligence,
 or any evidence on which any one can reasonably come to a
 definite conclusion what happened to it. It seems to me
 the strongest way in which the case can be put for the goods
 owner is this : The parcel is traced into an office of the
 company. As one is entitled to suppose that it would not
 leave that office in ordinary transit without some way-bill
 or documentary record of the transit, and none is disclosed
 by the company, the parcel is to be taken not to have left
 the office by carriage ; and as it is an office of the company,
 it must be taken to be a place in which the company has
 control, and the public are controlled. If so, as a parcel
 in the control of the company is not produced, and the company
 do not excuse themselves, the inference should be that the
 wilful misconduct of the servants of the company who control
 it prevents it being produced. At any rate this is an inference
 which the county court judge may reasonably draw. I have
 carefully considered the two arguments, and while I think
 the case is near the line, and I have had some hesitation on
 which side of the line it falls, I have come to the conclusion
 that there are too many suppositions and assumptions in
 the case for the goods owner, and that there is no ground
 on which it can reasonably be found as a fact that the goods
 were lost by wilful misconduct of the company's servants. I
 desire to say further that I remain of the opinion expressed in
Smith v. Midland Ry. Co. (1) that wilful misconduct may be
 found on circumstantial evidence, which is always a question
 of inference depending on probabilities ; and that some
 expressions in *Great Western Ry. Co. v. Rimell* (2) and

(1) 88 L. J. (K. B.) 868.

(2) (1856) 18 C. B. 575.

M'Queen v. Great Western Ry. Co. (1) are unsafe guides on this question. It is clear also that it is not necessary to prove wilful misconduct of a particular servant; misconduct of some unknown one of a class of servants will be sufficient. I also desire to reserve the question of the burden of proof if the consignor does not begin by alleging, as in this case, the loss of the goods; when the question arises the facts of the particular case will be all-important.

We were pressed with the Irish decision given by Palles C.B. in *Curran v. Midland Great Western Ry. Co. of Ireland* (2), a decision requiring careful consideration, both on account of the great legal eminence of the Chief Baron, and of the fact that it proceeds on a line of reasoning not considered in, and indeed somewhat inconsistent with, such English cases as *Rimell's Case*. (3) The subject matter was pigs on a joint sea and land transit from Ireland to England; and while on the one hand a pig is an unlikely animal to be stolen alive on such a transit, there appears to me considerable possibility of commixture of pigs and consequent misdelivery if other consignments of pigs are travelling on the same journey. The Chief Baron's reasoning seems to be this: It is presumed in the absence of evidence to the contrary that the pig continues in existence, and remains the property of the plaintiff, and continues in the possession of the defendants; and in those circumstances, not to deliver him and not to explain why you do not deliver him is wilful misconduct. I do not think that reasoning applies to a case where the consignor says "You have lost the article," and the company say "We cannot trace the article in our possession at all," an answer which in the case of small articles easily disposed of may merely involve negligence, or theft by outsiders. I cannot think, therefore, that *Curran's Case* (2) affords any general rule irrespective of the particular facts of the particular case under consideration.

One cannot, however, shut one's eyes to the fact that extensive thefts are taking place every day by railway

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(1) (1875) L. R. 10 Q. B. 569.

(2) [1896] 2 I. R. 183.

(3) (1856) 18 C. B. 575.

C. A. servants and, which is worse, that the thefts are so extensive
1920 that a number of servants not concerned in the thefts must
SMITH, LD. be assuming an attitude of acquiescence instead of doing
v. their best to stop them. In these circumstances I think it
G. W. RY. will be very regrettable if railway companies take up the
Co. position of actively resisting all claims for information and
Scrutton L.J. assistance from those whose goods are stolen, instead of
giving their consignees and consignors all possible
information as to the disappearance of the goods. There is
no doubt at present railway companies as carriers of goods
are both inefficient and unsafe.

In my view, therefore, though with some hesitation, the
appeal should be dismissed with costs.

ATKIN L.J. This is an appeal from a judgment of the
Divisional Court reversing the judgment of the learned county
court judge of the Birmingham County Court who gave
judgment for the plaintiffs on a claim for damages in respect
of the carriage by the defendants of a parcel of boots. The
boots were carried under the terms of a general contract
which provided that unless notice to the contrary were given
all goods carried for the plaintiffs were to be on owners'
risk terms, the express stipulation being "I agree to relieve
you from all liability for loss, damage, misconveyance,
misdelivery, delay, or detention of or to such goods . . .
except upon proof that such loss, damage, misconveyance,
misdelivery, delay, or detention arose from the wilful mis-
conduct of your servants." The learned judge held that
such proof had been given by the plaintiffs, and the only
point that can be raised on appeal is that in law there was
no evidence upon which the judge could so find. If there
is any such evidence then whether his finding is right or
wrong; is against the weight of the evidence or not; there
is no appeal. The contract does not stipulate what the
nature of the proof should be, and I apprehend that any
evidence constituting legal proof is adequate to discharge
the onus cast on the plaintiffs, whether it be circumstantial
evidence or not, and whether it consist in whole or in part

of presumptions which are recognized in law as part of relevant proof. The plaintiffs proved delivery on February 14, 1919, to the defendants' carmen of a parcel to be carried by the defendants from Birmingham to Wilton on the terms I have mentioned. They further proved that the parcel did not reach its destination, that on March 4 they wrote to complain, and that on March 5 they were told the matter should have immediate attention; that they heard no more from the defendants until June 7 when in answer to a letter from their solicitor asking by whom and when the parcel was or should have been handled and what had become of it, they were told the matter should receive immediate attention; that nothing further was heard until June 28, when, in answer to a further letter from the plaintiffs' solicitor threatening proceedings unless he received by return of post some account of what had happened to the parcel, the defendants wrote that the reason of the delay in the case was that "the whole of the papers have been lost in transit," and that as soon as possible a definite reply should be given. No reply or explanation of any kind had been given on July 5, when the present proceedings were commenced. The plaintiffs administered what by consent of the parties were taken to be formal interrogatories and put in the answer to the first interrogatory which admitted receipt, and part of the answer to the second; but, as counsel for the defendants read the whole of the answer in the county court, it must be taken that the judge in pursuance of Order XVIII., r. 16, directed the whole answer to be put in. The question and answer were: "On what date and at what time was the parcel referred to in the first interrogatory:—(a) dispatched by the defendants from Birmingham; (b) received by the defendants, their servants or agents at Wilton; (c) delivered or tendered by the defendants their servants or agents to the consignee?" The answer was:—"Inquiries have been made, but the defendant company have no knowledge or means of knowledge:—(a) as to whether the said parcel was dispatched from Birmingham; (b) as to whether the said parcel was received by the defendant company their servants

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C. A. or agents at Wilton: there is no record of such receipt;
1920 (c) as there is no record of the said parcel being received at
SMITH, LD. Wilton it is believed the same was lost; never arrived at
v. G. W. RY. Wilton, and was never delivered or tendered to consignee.”
Co. It will be noticed that no statement is made as to what
Atkin L.J. inquiries have been made or of whom, or, what is of much
importance in this case, when. The other answers to
interrogatories were not used by the plaintiffs, and in my
opinion neither the plaintiffs nor the defendants nor the
Court are now entitled to refer to them. The defendants
called no evidence, and based their defence upon the contention
that the plaintiffs had given no evidence upon which the
judge could find proof of wilful misconduct.

I think that this contention is ill founded. The defendants
had been entrusted with possession of the plaintiffs' chattel
to be carried to a particular destination on agreed terms.
That they were under some obligation to the plaintiffs cannot
be disputed. They had contracted to convey it to Wilton,
and if they had refused altogether to convey it, or had by
inadvertence or otherwise conveyed it by a wrong route,
and thereby lost it, I apprehend that they could have been
sued for breach of contract. So they would be plainly liable
on this contract for the wilful misconduct of their servants.
The defendants then having been entrusted with possession
of the chattel, on the expiration of a reasonable time for
performance of the contract a demand is made and delivery
is not given. These are the ordinary incidents of proof in
actions in detinue and in conversion. The defendant is
deemed still to be in possession of the chattel and his failure
to hand over the chattel is evidence of his having converted
it to his own use or of his detaining possession from the
plaintiff. Ordinarily he cannot be heard to say that he lost
it by his negligence. He may in most cases prove that the
chattel has passed out of his possession without his default
by some cause for which he is not responsible. In the present
case he could excuse himself by showing that any of the
excepted causes might as probably as wilful misconduct have
accounted for the non-delivery. Even without evidence by

the defendants the plaintiffs might in proving their own case have given evidence which negatived the defendants' liability, as by showing that the non-delivery was equally likely to have been due to one of the excepted causes as to conversion. But in the absence of such evidence there was, I think, *prima facie* evidence of conversion or of detention by the defendants. Now such conversion or detention need not necessarily be the result of wilful misconduct, and the plaintiffs had to do more than give *prima facie* evidence of innocent conversion or detention. They contended that they did give sufficient further evidence by establishing the long continued failure of the defendants to give any explanation as to what had happened to these goods. They further relied on what they contended to be the inadequate explanation of the delay, that the papers had been lost in transit. I think that such considerations afford some evidence upon which the judge could find that there was a *prima facie* case that the conversion or detention was not innocent but wilful. If the carman had failed to deliver the chattel at the collecting station and had also failed to give any explanation of its disappearance, the absence of explanation would have been evidence of loss by his misconduct against both him and his employers. It is the commonest type of evidence in criminal proceedings for misappropriation of money or chattels. In this case, though it was not proved at the trial, there is no question but that the carman did in fact complete his part of the transit, but this only brings the article into the possession of one or more of the company's servants, and the absence of explanation, though it loses some of its weight, still retains its character of evidence. The learned judge had to decide whether coupled with the presumption arising from demand and refusal it amounted to *prima facie* proof, and it is clear that he thought it did. Once a *prima facie* case was made the judge was entitled to consider the fact that the defendants, who had offered no explanation up to the commencement of proceedings, offered no explanation at the hearing; and by explanation I do not mean only an account of its disappearance; they gave no assistance to

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C. A. the Court as to the course of business, the inquiries they
 1920 made, or who was the last person who, to their knowledge,
 SMITH, LD. either did or should have handled the parcel. Suggestion
 v. was made that the defendants had during the proceedings
 G. W. RY. by answering other interrogatories given such explanation
 Co. as prevented any hostile inference being drawn from their
 Atkin L.J. previous silence. I do not myself think, as I have said, that
 they have any right to rely on such answers made, as it
 must be taken, under compulsion of the rules and upon
 terms that the plaintiffs might or might not use them. But
 if the defendants did intend to rely on the facts stated in
 the other answers they should have proved those facts, a
 proceeding which, as it would involve calling a witness subject
 to cross-examination, it is sufficiently obvious they were
 determined not to take. I have little doubt that once there
 is a *prima facie* case of conversion the doctrine "*Omnia*
 præsumuntur contra spoliatorem" applies, of which the decision
 in *Armory v. Delamirie* (1) is a well-known instance. See
 the notes to the case in Smith's Leading Cases. (2) I am
 glad to think that the above conclusion follows the reasoning
 of Pallett C.B. in *Curran v. Midland Great Western Ry. Co.*
 of Ireland (3) where in a series of propositions very carefully
 framed he arrives at the conclusion that the "unaccounted
 for refusal to deliver" the goods was evidence of wilful
 misconduct. That case seems to me not to turn on the
 nature of the goods carried, and not to be capable of being
 distinguished from the present. In any case I see no reason
 for supposing that it is easier for a railway servant even in
 Ireland to steal a pig than a pair of boots. It does not seem
 to me to be inconsistent with any of the cases cited in argument
 in all of which either evidence or explanations had been given
 by the defendants. The passage in *M'Queen v. Great Western*
 Ry. Co. (4) that in considering whether a felony has been
 committed by A. rather than by B., the greater or less degree
 of probability cannot be an element in the consideration, I
 can hardly believe to be an accurate report of Cockburn C.J.'s

(1) (1722) 1 Str. 505.

(3) [1896] 2 I. R. 183.

(2) Vol. i., 12th ed. (1915), p. 411.

(4) L. R. 10 Q. B. 569, 573, 574.

words ; if it is, with great respect, the proposition cannot be maintained and, I think, must be taken to be disapproved by the Court of Appeal in *Smith v. Midland Ry. Co.* (1) The form of the action appears to me to be immaterial. The defendants in argument laid stress on the fact that the plaintiffs, who in their particulars evidently meant to rely on a simple bailment leaving it to the defendants to set up the special contract, averred that the defendants failed to deliver "and lost" the goods. This, it was said, merely alleged a loss and was consistent with a loss from which the defendants were relieved under the contract. On the other hand the contract itself shows that the words cover a loss from wilful misconduct, and I think that the particulars are sufficient. However the claim may be framed, it appears to me that the above presumptions together with the additional evidence referred to are available to make a *prima facie* case in favour of the plaintiffs. It was suggested that to affirm the county court judge laid an undue burden upon the defendants. If it were so it would be irrelevant, but I cannot think it is so. If a bailee says, I have received your chattel ; I have not delivered it in the terms of the bailment ; and I will give you no information as to what I know about it, or what steps I have taken to find out about it, he suffers no hardship if unkind inferences are drawn against him. This judgment is far from throwing the onus upon him which rests upon the plaintiff, and it only requires the performance of very ordinary business obligations in the way of explanation to secure the very large measure of relief stipulated for in the contract of carriage. I think that the appeal should be allowed and the judgment of the learned county court judge restored.

C. A.

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Appeal dismissed.

Solicitors for appellants : *Ward, Bowie & Co., for W. L. Highway, Birmingham.*

Solicitor for respondents : *A. G. Hubbard.*

(1) 88 L. J. (K. B.) 868.

W. H. G.

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Company—Shares—Action for Calls—Defence of Misrepresentation.

To an action by a company for calls on shares it is not a sufficient answer for the defendant to say that he has repudiated the contract because of misrepresentation in the prospectus. In order to succeed he must show not only that he has repudiated the contract but that he has, after discovering the misrepresentation complained of, taken prompt steps to have his name removed from the register of the company.

Bulch-y-Phwm Lead Mining Co. v. Baynes (1867) L. R. 2 Ex. 324 explained.

Observations in *Aaron's Reefs v. Twiss* [1896] A. C. 273 applied.

APPEAL from the City of London Court.

The plaintiffs sued the defendant for a first call of 5s. per share, payable on December 21, 1919, upon 111 shares allotted to him.

The company's prospectus, which was issued on October 11, 1919, contained (inter alia) a paragraph stating that the directors had arranged with one F. to act as underwriter to the company. On receipt of the prospectus the defendant applied for 150 shares and was allotted 111. He was duly placed on the register of members.

In November, 1919, the appointment of F. as underwriter to the plaintiff company was cancelled.

On December 6, 1919, notice was given by the plaintiffs to the defendant of the first call; and on December 10 the defendant wrote to the plaintiffs the following letter: "Reading in the prospectus of your company that Mr. F. had been appointed underwriter, and having every confidence in that gentleman, I applied for 150 shares, which I should not otherwise have done. Shares to the number of 111 were allotted to me, on which I have paid to the company's bankers the sum of 27l. 15s. I now learn that Mr. F.'s appointment has been cancelled, and as this constitutes a breach of faith and of contract, I decline to pay any further instalment on the shares, and request you to refund the amount already paid, and to remove my name from

the list of shareholders." The company informed the defendant that they could not cancel the shares allotted to him, and as the defendant did not pay the call in question they, on June 4, 1920, issued a plaint in the City of London Court. The defendant gave notice that he would rely on the following grounds of defence: (1.) That he was induced to take the shares by misrepresentation and/or non-disclosure of material facts; (2.) that he was entitled to rescission of the contract to take the shares; and (3.) to rectification of the register. He counterclaimed 27*l.* 15*s.*, the amount paid by him on his application for, and the allotment to him of, the 111 shares.

At the trial on July 27 the company's solicitor submitted that, even assuming that there had been misrepresentation in the prospectus, the defendant had allowed his name to remain on the register and had taken no steps to have it removed, and was now, by reason of his laches, precluded from taking steps; and that in any case the county court had no jurisdiction to rectify the register. The deputy county court judge accepted this contention and gave judgment for the plaintiffs.

The defendant appealed.

Ralston (*F. Hinde* with him) for the defendant. To an action for calls it is a good defence to show misrepresentation in the prospectus, where, as in this case, the shareholder has repudiated the shares and given notice thereof to the company. That was laid down in terms in *Bulch-y-Plwm Lead Mining Co. v. Baynes* (1); it was recognized in *Bentley v. Black* (2); and it is so stated in Halsbury's Laws of England, vol. v., p. 127, s. 205.

H. G. Robertson for the plaintiffs. A person to whom shares are allotted becomes a member of the company and bound by its articles of association. The register of shareholders is *prima facie* evidence that a person whose name appears therein is a member of the company, and unless the

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(1) L. R. 2 Ex. 324.

(2) (1893) 9 Times L. R. 580.

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person who alleges that he has been induced by misrepresentation to subscribe for shares takes steps to have his name removed from the register he continues liable to pay calls. Those steps, moreover, must be taken promptly; otherwise the Court will refuse relief: *Deposit and General Life Assurance Co. v. Ayscough* (1); *Ogilvie v. Currie* (2); *Taite's Case* (3); *Heymann v. European Central Ry. Co.* (4); and *In re Scottish Petroleum Co.* (5)

[LUSH J. What do you say as to *Bwlch-y-Plwm Lead Mining Co. v. Baynes* (6) ?]

That was a decision on demurrer before the Judicature Act, and cannot now, in view of later authorities, be considered good law. In *Bentley v. Black* (7) the point does not appear to have been taken. The views expressed in *Aaron's Reef's v. Twiss* (8), although obiter, deal with this very point and show that so long as a person's name remains on the register he has the status of a shareholder and cannot escape liability for calls which by s. 14 of the Companies (Consolidation) Act, 1908, are made a specialty debt. As Lord Watson pointed out (9), "the authorities relating to rescission by the member of a registered company with the view of having his name removed from the list rest upon considerations which involve the interests of creditors of the company, or of his socii." So, too, Lord Davey said (10), "Where a person has contracted to take shares in a company and his name has been placed on the register, it has always been held that he must exercise his right of repudiation with extreme promptness after the discovery of the fraud or misrepresentation for this reason: the presence of his name on the register may have induced other persons to give credit to the company or to become members of it." Lord Davey, in using the expression "he must exercise his right of repudiation" clearly meant effective repudiation by taking steps to have the name removed from the register.

(1) (1856) 6 E. & B. 761.

(2) (1868) 37 L. J. (Ch.) 541.

(3) (1867) L. R. 3 Eq. 795.

(4) (1868) L. R. 7 Eq. 154.

(5) (1883) 23 Ch. D. 413, 434.

(6) L. R. 2 Ex. 324.

(7) 9 Times L. R. 580.

(8) [1896] A. C. 273.

(9) Ibid. 289.

(10) Ibid. 294.

[LUSH J. What do you say as to the proposition in Halsbury's Laws of England, vol. v., p. 127, s. 205 ?]

The proposition is laid down too widely, and can only be accepted with the qualification now submitted.

[McCARDIE J. In the precedent given in Bullen & Leake, 7th ed., p. 568, of a defence to such an action as this there is no suggestion that the defendant had set up a claim to rectify the register. That would seem to treat *Bwlch-y-Plwm Lead Mining Co. v. Baynes* (1) as good law.]

In Palmer's Company Precedents, 11th ed., Part I., p. 1368, a precedent is given of a defence to an action for calls with a counterclaim for rectification of the register.

Whiteley's Case (2) and *Ex parte Stevenson* (3) were also referred to.]

Ralston in reply. The proposition in Halsbury's Laws of England, vol. v., p. 127, s. 205, is a correct statement of the law and shows that misrepresentation is a sufficient answer to a claim for calls where there has been prompt repudiation. [He also referred to *Glamorganshire Iron and Coal Co. v. Irvine* (4) and *Briggs' Case*. (5)]

LUSH J. This appeal raises an interesting and important question. Considering its importance it is somewhat strange that there is no decision directly in point. The action was one for calls. The defendant resisted it on the ground that, as he alleged, there had been a fraudulent misrepresentation in the prospectus. Mr. Ralston for the defendant has told us that fraud was not specifically alleged, but he said there was a misrepresentation which amounted to fraud. Nothing turns upon the distinction and I will treat the defence as alleging fraudulent misrepresentation. The only reason why I mention the word "fraud" is that it might be contended that as the contract had been performed and the shares allotted there would have been a difficulty in the defendant's way if he had only alleged an innocent misrepresentation; but I do not pause to consider whether that would or would

(1) L. R. 2 Ex. 324.

(3) (1867) 16 W. R. 95.

(2) [1900] 1 Ch. 365.

(4) (1866) 4 F. & F. 947.

(5) (1869) 19 L. T. 758.

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not have made any difference. The defendant gave notice of a special defence and counterclaim in which he alleged that he was entitled to a rescission of the contract to take the shares and to rectification of the register, but he did not claim either rescission or rectification for the good reason that the county court had no jurisdiction to deal with such a claim. The deputy county court judge gave judgment for the plaintiffs on the claim and counterclaim without stating his reasons, but, as I understand, he held that although the misrepresentation was made and proved he considered he must give judgment for the plaintiffs because the defendant had not proved that he was entitled to have the register rectified and the contract rescinded. The question for us is, was he right in taking that view?

Mr. Ralston for the defendant quoted a case which at first sight appears to be an authority in his favour: *Bwlch-y-Plwm Lead Mining Co. v. Baynes* (1)—decided in 1867. There a shareholder, sued for calls, set up this plea: "That the defendant was induced to become the holder of the said shares by the fraud of the plaintiffs; and that he, the defendant, never, after he had notice of the said fraud, recognised any rights or liabilities in him, the defendant, as a shareholder, and has never received, and will not receive, any benefit whatever from the said shares; and within a reasonable time after he had notice of the said fraud, and before he had received any benefit from or in respect of the said shares or any of them, he, the defendant, repudiated and disclaimed the said shares and all title thereto, and all liability in respect thereof, and gave notice of his repudiation and disclaimer thereof to the plaintiffs." There was a demurrer, and the question was whether the plea was a bad plea. Before I turn to the judgment, which was delivered by Bramwell B., it is important to notice that counsel who supported the plea put his case in this way: he cited *Deposit and General Life Assurance Co. v. Ayscough* (2) and said: "'Repudiation' is a term implying that the defendant has done all he can to free himself from liability." Bramwell B.

(1) L. R. 2 Ex. 324.

(2) 6 E. & B. 761.

said (1): "Now, it is a rule that a contract is voidable at the option of the person who has entered into it, if he has entered into it through the fraud of the other party, and has repudiated it on the discovery of the fraud. This"—that is repudiation—"includes giving up all benefit from it, and restoring the other party to the same condition as before, as far as possible. Now the plea alleges all these facts—fraud, prompt repudiation and restitution, as far as possible. It must be good, therefore, at common law, and so we hold." Then Bramwell B. refers to cases in the winding-up of companies which are not material, and he adds at the end: "We have to decide a common law question. The authorities at common law are in the defendant's favour, and the ruling of Willes J. at Guildford in *Glamorganshire Iron and Coal Co. v. Irvine* (2) in 1866, is in point. Our judgment is for the defendant." At first sight it would seem as if in that case the Court had decided that it is a good defence to an action for calls that the defendant has within a reasonable time after discovery of the fraud repudiated his contract, and that it is no necessary part of the defence that he has either taken steps to rescind the contract and rectify the register, or that he is in a position then to do so. When one looks carefully at the case, however, I do not think it can be cited as an authority for that purpose, because, as I have said, it was argued on demurrer, and the Court therefore treated the facts stated in the plea as having been established, and, if I understand Bramwell B.'s observation with regard to restitution, he treated the plea as raising among other defences this, that the defendant had put the parties back into their original position. I do not otherwise understand why Bramwell B. referred to restitution. In that view the Court held that the demurrer failed, and that the plea was good. That cannot be relied upon as an authority in support of the proposition that in an action for calls the defendant can successfully resist a claim by merely proving repudiation after discovery of the fraud, or that it establishes Mr. Ralston's contention that although the defendant has

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allowed his name to remain on the register for a long period without having taken any steps to rectify, he still can successfully defend the action by proving the repudiation. Nor is the case to which Bramwell B. referred, *Glamorganshire Iron and Coal Co. v. Irvine* (1), an authority in Mr. Ralston's favour. The only matter there in question with which the report is concerned is, what amounts to fraud, and whether the fraud, if any, of the person who committed it was the fraud of an agent of the company. Willes J. did not deal or intend to deal with the question with which we are concerned. Mr. Ralston also cited a passage from Halsbury's Laws of England, vol. v., p. 127, s. 205, which undoubtedly goes a long way to support his contention. The language there used appears to suggest that it is immaterial whether the defendant in an action for calls has or has not taken any steps to rectify the register, and that it is immaterial whether he has waited so long that it would be impossible for him at the time the action was brought to take effective steps to have his name removed from the register.

Upon the footing that the case is not precisely covered by authority how ought we to decide this case? There are three classes of cases in which the question of repudiation has to be considered. The first is where there is an executory contract and the defendant pleads that he has been induced to enter into it by fraud. No difficulty occurs in that case. All the defendant has to make out is that he has not affirmed the contract, but that on the contrary when he had notice of the fraud he disclaimed or repudiated it. If he establishes that he succeeds in resisting the claim founded upon the executory contract. The second class of cases is where the contract has been executed—where the chattel or the chose in action, whatever it may be, has been transferred, or where, if it be a contract for the sale of land, the land has been conveyed. There the defendant must do more than merely prove the fraud and the repudiation: he must prove that there has been a *restitutio in integrum* as far as possible.

(1) 4 F. & F. 947.

The contract having been completed and the subject-matter of it having been transferred he must, in order to rescind the contract or to resist an action, show that there has been restitutio. At first sight it might appear that that includes a case like the present where there was a contract to take shares and the shares have been duly allotted. Shares stand, in my opinion, upon an entirely different footing; they represent what I may call a third class of cases. If a person agrees to accept shares, and shares have been allotted to him, and his name is on the register, he is liable by statute to pay the calls. I do not mean that there is an express section in the Companies Act which says that he shall pay the calls, but the statutory right which a company has to enforce payment of what is due as a debt in effect amounts to a statutory obligation upon the shareholder to pay the calls. What is a proper defence to an action for calls brought against a shareholder? The member being liable qua shareholder to pay the calls, the only plea one would have thought that could be effective would be a plea that he is not a shareholder. The plaintiff alleges that the defendant has a certain status, that of shareholder. The statute says a shareholder must pay the calls. One would expect the plea would be: "I am not a shareholder." In substance that is the proper plea. I do not mean that a person must plead and prove that his name has actually been taken off the register, but he must plead that, so far as he is concerned, he has taken steps, and taken them within a reasonable time after discovery of the fraud, to have his name removed from the register. That is all he can do. He cannot take his own name off the register and thereby cease to be a shareholder. He can only invoke the jurisdiction of the Court and ask it to do so. If he has done that, and if it turns out ultimately that his name will be removed from the register, the judgment of course dates back to his application, and it will in substance turn out to be true that he has ceased to be a shareholder and therefore not liable to pay calls. That, in my view, is the position in law of a defendant in an action of this kind; it is not enough merely to treat the claim as if it were a claim on a contract

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and say: "I have been deceived, and I have repudiated my contract."

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Although the precise point was not involved in the decision, *Aaron's Reefs v. Twiss* (1) shows that the view that I have endeavoured to express is the correct one. The headnote to that case says this: "Where a person is induced by a fraudulent prospectus to apply for an allotment of shares, and his shares are afterwards forfeited by his failure to pay calls, he ceases to be a shareholder and becomes a mere debtor to the company, and if he has done nothing to affirm the contract he may repudiate it and defend an action for calls on the ground of the fraud." The point there was not identical with the point here, because there the defendant had ceased to be a shareholder. His name had been removed, because the company had forfeited his shares. In the present case the defendant has not ceased to be a shareholder. In dealing with the position in regard to a shareholder who is sued for calls, the circumstances under which he can resist the claim are dealt with in the speeches of the learned Lords in the case I have just mentioned. Lord Halsbury L.C. said (2): "I think some little doubt was entertained during the progress of the argument as to whether the plea of fraud could be relied upon, having regard to the allegation that the status of shareholder acquired by the person who subscribed to the shares threw upon him the necessity of showing that he had not adhered to the contract, and that, notwithstanding the fraud, he must do that which in him lay to get rid of the character of shareholder in order to enable him to avail himself of the plea of fraud. I did not very clearly follow at the moment how that arose, but I see that the same question arose in a case in the Court of Queen's Bench, and it is instructive, not with reference to the mere question of the fraud here, but with reference to the state of the law which it discloses, to see how that question was dealt with. In that case, as in this, the action was for calls, and the defendant had pleaded simply that the contract was obtained by fraud. The judgment of the full Court of Queen's Bench gives the

(1) [1896] A. C. 273.

(2) Ibid. 277.

reason why that plea, without setting out what is put forward in this plea, was a bad plea." Lord Halsbury was there referring to *Deposit and General Life Assurance Co. v. Ayscough* (1) which I have already mentioned. He then continued: "It was there contended, as at one time I thought it might be contended here, that a simple plea of fraud was enough—that, as the plaintiffs were suing upon a contract, it would be enough to say that the contract was obtained by fraud. But the learned judges point out that the action was brought in pursuance of the statute 7 & 8 Vict. c. 110, s. 55, which provides that where a call has been made by a company 'it shall be sufficient to state only that at the time of the commencement of the suit the defendant, as the holder of certain shares in a certain company or undertaking, as the case may be was indebted to the company in a certain sum for certain instalments of capital then due and payable in respect of the said shares, and that the defendant hath not paid the same' and that if it be proved upon the trial of any such action 'that the defendant was the holder of any share when such instalments or any of them, in respect of the same, and for which the action is brought, became due, then such company shall recover such instalments.' The answer made to the simple plea of fraud is very compendiously given by Crompton J. in the course of the argument. He says: 'When the record shows that the contract has been executed so far that the defendant has received a benefit, I have doubted whether in an action on the contract, the plea of fraud must not show that he has restored what he has received. But this action is not upon the contract; it is given by statute 7 & 8 Vict. c. 110, s. 55, against the holder of shares; and your plea is not good unless it shows the defendant not to be the holder of the shares. He is the holder at least till he disaffirms though he became so in consequence of fraud.' Upon that ground the plea was held bad." These observations go far, in my opinion, to support the contention of Mr. Robertson that the mere plea of fraud and repudiation is not sufficient.

(1) 6 E. & B. 761.

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Lord Watson used language to the like effect. He said (1): "The authorities relating to rescission by the member of a registered company with the view of having his name removed from the list rest upon considerations which involve the interests of creditors of the company, or of his socii; and they have no application to the present case unless it is shown that on May 5, 1891"—that is the date of the forfeiture—"the respondent had lost his right to escape from the liabilities of a shareholder on the plea that he had been fraudulently induced." Lord Macnaghten said (2): "After the respondent's shares were forfeited he ceased, as the Lord Justice observes, to be a shareholder, and became merely a debtor. After that date it was not, in my opinion, incumbent upon him to take any active step to avoid the contract. He was perfectly justified in waiting the company's attack." Lord Davey said (3): "It is not proved by any evidence that the respondent had lost his right to repudiate at the date of the notice; and I think that, not having done any act to affirm the contract, he was not then bound to take any step for the mere purpose of getting rid of his liability to pay this call." Those passages assume that a mere plea of fraud and repudiation is insufficient. They take it for granted that a shareholder must prove that he has taken effective steps to have his name removed from the register before he can successfully set up the discovery of the fraud and the repudiation of it. In view of the observations in that case we cannot hold that a mere plea of fraud and repudiation is sufficient without going in the teeth of the passages I have just read.

It is interesting to observe that in Sir Francis Palmer's *Company Precedents*, 11th ed., Part I., p. 1368, a precedent of a defence to an action for calls is given which contains the statement that steps have been taken to rescind the contract and rectify the register. That forms part of the necessary plea. As I have said the defendant must prove that he has taken those steps. Of course if the Court in which the

(1) [1896] A. C. 289, 290.

(2) Ibid. 293.

(3) Ibid. 295.

proceedings are taken is itself competent to rectify the register it is quite sufficient to counterclaim then and there for rectification ; it is just as if the defendant can plead that he had in a competent Court already taken those steps. Here the county court judge had no jurisdiction to deal with it, and the defendant did not, and could not successfully, plead by way of counterclaim that the register ought to be rectified, but he pleaded that he was entitled to have it rectified. He puts his case on that ground here. I feel very great doubt whether if a defendant is entitled to have the register rectified, that is, if there has been no laches on his part, that plea is sufficient, because if it were, a judge might give judgment for the defendant on the ground that he was not too late, and that he had proved the fraud, and the defendant might go away and never take any steps to rectify the register. I should have thought that the defence of his right to rectification would not be sufficient unless it was followed in some way by showing that he had commenced the proceedings or had given some undertaking to commence them. It is quite clear that this defendant was not entitled to rectification, for he waited eight months after discovering the fraud and did nothing. No doubt he had given notice repudiating the shares, but he had taken no steps to have his name removed from the register. Therefore the deputy county court judge was right in saying in effect : " You not only have not taken those necessary steps, but you could not take them. You are a shareholder. You cannot, so far as it rests with you, cease to be a shareholder, and, being a shareholder, you are necessarily liable to pay calls."

If the law were otherwise, very serious inconveniences would follow. There might be fifty shareholders on the register who have all been deceived by the fraudulent misrepresentation. If Mr. Ralston is right the list of shareholders might consist of persons who apparently are able and liable to pay the calls which are about to be made. They may have known of the fraud, and they may have done nothing for eight months to have the register rectified, as in the case of the

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present defendant. If it be true to say that they are all in a position to resist successfully the claims for calls the register of shareholders is grossly misleading. It would be disastrous if we had to hold that. The list of shareholders would convey nothing to persons who looked at it as to the ability of the company to enforce payment of the calls. In my opinion it is, and, so far as I know, always has been, the law, that the defendant in order to avoid payment of calls must prove in substance that he is not a shareholder. I have already explained that that includes the case of a shareholder pleading that he has already taken steps to have the register rectified and that the circumstances are such that he is in a position to have the register rectified. For these reasons I think the judgment of the deputy county court judge was right.

MCCARDIE J. stated the facts and continued: It was not disputed that the actual repudiation by the defendant was in good time. A second point I desire to state is that the plaintiff company was not, and is not, in liquidation; it is a going concern—a circumstance which it is all important to remember.

If a shareholder desires to avoid his contract to take shares, it is not necessary that he should prove fraud; it is enough if he proves a misrepresentation of fact. If a contract has been executed and property has passed, then, in order that the conveyance shall be set aside, fraud must be shown. That is the effect of *Seddon v. North Eastern Salt Co.* (1), which was approved and followed by the Divisional Court in *Angel v. Jay.* (2) The effect, however, of the company decisions is to show that contracts for the taking of shares, even though followed by allotment and the placing of the applicant upon the register, are not contracts which fall within the principle of *Seddon's Case.* (1) It might well have been thought that they fell within that principle, but in fact they do not, as is established with reasonable clearness in *Smith's Case* (3);

(1) [1905] 1 Ch. 326.

(2) [1911] 1 K. B. 666.

(3) (1867) L. R. 2 Ch. 604.

Reese River Silver Mining Co. v. Smith (1); and by the authorities mentioned in Buckley on Companies, 9th ed., p. 95; and Palmer's Company Precedents, 11th ed., Part I., p. 190. If the principle of *Derry v. Peek* (2) had been applied to company matters a vast number of applications to rectify the register would have failed in recent years, but no one I think has suggested that it was essential to prove fraud in an application to set aside an allotment of shares or to rectify the register.

We must assume for the purpose of this case that there was a misrepresentation established by the defendant of such a nature as, *prima facie*, to entitle him to avoid the contract. Only upon that footing can we discuss the point of law which has arisen, apparently for the first time, for full discussion and decision. Mr. Ralston has argued that it is enough if the defendant has established a right to avoid this bargain by mere disaffirmance on the ground of misrepresentation. That is as if it were an ordinary contract, and indeed Mr. Ralston might well point to Bullen & Leake's Precedents of Pleading, 7th ed., pp. 567-569, as supporting his proposition. The question is whether or not it is enough that a shareholder has repudiated and disaffirmed within a proper time, or whether it is essential that he should also have commenced proceedings within an equally proper time for the rectification of the register of the company. Halsbury's Laws of England, vol. v., p. 127, s. 205, suggests that the present plea of the defendant was enough to enable him to escape from liability. Sect. 205 in Lord Halsbury's work was written by Mr. Hamilton K.C. in conjunction with other counsel, and the authorities cited in support of the proposition there stated are *Bwlch-y-Plwm Case* (3); *Bentley v. Black* (4); *Deposit and General Life Assurance Co. v. Ayscough* (5); and *Aaron's Reefs v. Twiss*. (6) But for the importance of the point here at issue I should not deal with those cases at all in view of the lucid manner in which Lush J. has dealt with

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(1) (1869) L. R. 4 H. L. 64, 79.

(2) (1889) 14 App. Cas. 337.

(3) L. R. 2 Ex. 324.

(4) 9 Times L. R. 580.

(5) 6 E. & B. 761.

(6) [1896] A. C. 273.

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them; but I think I ought to express my view about the *Bwlch Case* (1)—a strong decision which appears to support Mr. Ralston's contention. It is important to remember first, that the decision was given in 1867 before the fusion of law and equity. Secondly, that it was given by a Court of common law of distinguished judges who were disinclined to recognize the equity rules which prevailed in 1867. Thirdly, that it was given in June, 1867, about two months before the delivery of the opinions of the House of Lords in the great case of *Oakes v. Turquand*. (2) Those opinions were given in August, 1867. In my view the *Bwlch Case* (1) cannot be regarded as an authority for the proposition submitted by Mr. Ralston, because it must be considered in conjunction with later authorities which establish new rules and indicate a new appreciation of the special legislation embodied in the Companies Act, 1862. Mr. Ralston has also pointed out that *Bentley v. Black* (3), a more modern case, seems to take the same view as that taken in the *Bwlch Case*. (1) In *Bentley v. Black* (3), as far as I can see, all that the defendant pleaded was that which the present defendant has pleaded, and Lord Esher M.R., with whom Bowen and Kay L.JJ. concurred, apparently treated the common law plea of disaffirmance and repudiation upon the ground of fraud as adequate in itself. The decision was given in 1893, and is therefore not open to the criticism which may be directed against the *Bwlch Case*. (1) Regarding *Bentley v. Black* (3) I may say, however, that the point which has been now argued before us does not seem to have been brought to the attention of the Court. Therefore that case cannot be treated as a definite authority upon the matter which calls for decision to-day.

It seems to me that it was not till some years after the Companies Act, 1862, was passed that the Courts fully realized the scheme embodied in that legislation. The Act created a special statutory corporation with new and peculiar characteristics. For example, the articles were by s. 16

(1) L. R. 2 Ex. 324.

(2) (1867) L. R. 2 H. L. 325.

(3) 9 Times L. R. 580.

constituted a covenant as between the company and its members, and therefore, if the articles provide for the payment of calls, as they do in the present case, the company sues upon the articles and pursuant to the register of members disclosing the defendant as a shareholder. Secondly, the Act of 1862 made the register *prima facie* evidence of membership. Thirdly, it gave the Court, by s. 35, power to rectify the register, but it did more than this; it created a new provision, as compared with the earlier Act 7 & 8 Vict. c. 110, by throwing the register open to public inspection, the object being that the public might form their own opinion as to the persons who constituted the shareholders of the company. In this provision, and in the power of rectification, lie the basis and the ratio of the decisions upon which Mr. Robertson has relied in his most able argument. This point was dealt with in *Oakes v. Turquand* (1), where Lord Cranworth said (2): "When the Legislature enabled shareholders to limit their liability, not merely to the amount of their shares, but to so much of that amount as should remain unpaid, it is obvious that no creditor could safely trust the company without having the means of ascertaining, first, who the shareholders might be, and, secondly, to what extent they would be liable. This is obviously the reason why the new statute opened the register to the inspection of all the world, indicating, as I think, very clearly that persons dealing with the company might trust to that register as containing a true exposition of the assets they had to rely on. The permission to all persons not shareholders to inspect the register, and so to ascertain who are shareholders, and to what extent they are liable, would have been an unwarrantable exposure of the affairs of the company, were it not that all persons have, or may have, an interest in knowing who are liable, and to what extent. This view of the case is strongly confirmed by the language of the statute where it defines contributories." In the same case Lord Colonsay said (3): "It is an error to hold that creditors are not supposed to

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(1) L. R. 2 H. L. 325.

(2) Ibid. 366.

(3) Ibid. 376.

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trust to the responsibility of the shareholders. The careful regulations as to registers of shareholders, and the publicity to be given to them, form a sufficient answer to that argument. Indeed it is plain from the reason of the thing that no credit would otherwise be given to the abstraction of a company.” In those words is to be found the explanation of the great body of dicta in cases where a shareholder has claimed the right to have his name taken off the register. There is also an interesting observation on the point by Lord Cairns in *In re Cachar Co.* (1) where he said: “It is difficult to dis-embarrass these cases of the effect which a man’s name being on the register has in inducing other persons to alter their position.” This is a matter of vital importance, because suppose out of 100,000 shares appearing on the register 70,000 belong to people who have written to the company repudiating, whether on good grounds or not, and who have asserted that they are not liable for the 19s. unpaid upon each share, but have done nothing more. Suppose too that a creditor were to go to the company’s office three or four months later and look at the register, he would find a register which revealed 70,000 shares upon which 19s. was yet to be called up. The company denying any misrepresentation in the prospectus would dispute their obligation to rectify the register. If the present defendant’s contention were upheld the creditor might be seriously misled. In this we find the explanation of the observations by Lord Cranworth and Lord Cairns I have just cited.

There is one further marked feature of this body of company decisions, and that is the effect of a winding-up order. It is impossible to understand many of these decisions, unless it is remembered that a winding-up order since the Act of 1862 bears a special significance and produces specific results upon contracts which have been made for the taking of shares, because since *Oakes v. Turquand* (2), the effect of which is very far reaching, decided the vital principle that when winding up has commenced there is no right to avoid a contract to take shares. The avoidance is not possible,

(1) (1867) L. R. 2 Ch. 412, 417.

(2) L. R. 2 H. L. 325.

unless there has been either proceedings instituted before the commencement of the winding up, or an agreement that the shareholders shall be bound by the result of other proceedings which have been taken for the avoidance of a contract to take shares. The point is well stated in Palmer's Company Precedents, 11th ed., Part I., p. 198. It is in connection with this principle that the decision in *Whiteley's Case* (1) is to be considered, because it was held there that the person in question, Whiteley, was entitled to avoid his contract to take shares, because he had taken proceedings before the winding up. The point at issue was whether or not that which he had done by his affidavit under Order XIV. amounted to the taking of proceedings within the established rule, and the Court of Appeal held that it did. The effect of these considerations is, therefore, that a prompt repudiation of the contract is essential. The decisions on that are set out with great clearness in Palmer's Company Precedents, 11th ed., Part I., p. 197. The special nature of the contract requires that the repudiation shall be prompt, and the question remaining is, must that repudiation be followed by proceedings to rectify the register? I have already stated that the article to which we have been referred in Halsbury's Laws of England was written by Mr. Hamilton K.C., the author of a treatise on Company Law, in the third edition of which it is stated (p. 140) that: "where a person is induced to take an allotment of shares by a material misrepresentation of fact made by or on behalf of a company, he is entitled as against the company to an order for the rescission of his contract to take the shares, and to a return of the money paid in respect thereof with interest, provided that he commences proceedings for that purpose within a reasonable time after he discovered the misrepresentation and before the commencement of the winding up of the company, unless another shareholder has commenced proceedings for such relief and there is an agreement between the company and such person that he will stand or fall by the result of such proceedings." That represents accurately the

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(1) [1900] 1 Ch. 365.

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result of the decisions upon this matter. *Deposit and General Life Assurance Co. v. Ayscough* (1) lays the foundation for the modern doctrine that it is not enough for a shareholder to disaffirm; he must also take steps to rectify the register of the company. Lord Campbell there said: "I hope that the opinion I then expressed will be found to be correct, and that a shareholder, induced to become such by the frauds of directors, may get freed from his liability. I have myself no doubt that he may; but, to do so, he must cease to be a shareholder." Crompton J. used language much to the same effect. That was said in 1856 in relation to the Joint Stock Companies Act, 1844. The principle there suggested has been adopted, and it is noticeable that the year after *Oakes v. Turquand* (2) was decided, which established the vital principle I have mentioned, *Ogilvie v. Currie* (3) came before Lord Cairns. That was a winding-up case, but the decision is valuable, because of the observations of Lord Cairns, who first pointed out that it is the bounden duty of a shareholder who alleges that he has been misled to disaffirm as soon as possible, and then he added: "I apprehend it was his bounden duty to have lost no more time than was absolutely necessary, to hand in a formal repudiation of the shares, and to follow it up by whatever steps were proper to have his name taken off the register at that time." That view represents the first result of *Oakes v. Turquand*. (2)

The next case to which I desire to refer is *Kent v. Freehold Land and Brickmaking Co.* (4) That was a winding-up case, but the observations of Lord Cairns again point to the necessity for the repudiation by the shareholder who alleges that he has been misled being followed by proceedings to have his name taken off the register. The observations of Lord Romilly in *Heymann v. European Central Ry. Co.* (5) are to the same effect, and *Taite's Case* (6), which was not a winding-up case, directly favours Mr. Robertson's argument.

(1) 6 E. & B. 761, 763.

(2) L. R. 2 H. L. 325.

(3) 37 L. J. (Ch.) 541, 546.

(4) (1868) L. R. 3 Ch. 493.

(5) L. R. 7 Eq. 154.

(6) L. R. 3 Eq. 795.

There was a repudiation, apparently in good time, but the shareholder omitted to move the Court for rectification expeditiously, and Wood V.-C. held that the delay of two months was sufficient to debar the shareholder from avoiding the contract embodied in the register of the company and the articles of association. *In re Scottish Petroleum Co.* (1) was a winding-up case, but the dicta there point emphatically to the case here represented by the plaintiff company. Kay J. said (2): "The law of the Court is that a man must take proceedings to have his name removed with due diligence if he has any complaint to make." The observations of Baggallay, Lindley and Fry L.JJ. in the same case support the view we are now taking. If a man is too late to secure rectification it must follow that he is too late to avoid the contract. There cannot be a register which cannot be rectified and a contract which can be avoided. The two things are inconsistent. Here, I think, the defendant has lost his right to rescind.

So far from *Aaron's Reefs v. Twiss* (3) being an authority in support of the proposition laid down in Halsbury's Laws of England, vol. v., p. 127, s. 205, it is exactly the opposite, for it recognizes with reasonable clearness the rule of law which has been submitted on behalf of the present plaintiffs and it distinguishes the application of that rule by the special facts which were before the House of Lords.

Having regard to the delay of seven months, the defendant in this case was too late in seeking to rectify the register.

I should add this with regard to the rectification of the register that an application to the Court is only essential when the company disputes the right to rectification. There is no reason why the directors, if they bona fide agree that a shareholder has a right to avoid the contract, should not thereupon assent to the rescission of the contract and rectify the register in the appropriate manner. An order of the Court is not necessary in such a case. That was decided in

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(1) 23 Ch. D. 413.

(2) Ibid. 420.

(3) [1896] A. C. 273.

1920 *Wright's Case* (1) and in *Reese River Silver Mining Co. v. Smith*. (2)

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I may also add that if our decision is right, text-books of pleading may have to be altered in order to conform to the view of the law which appears to be established by the existing authorities.

LUSH J. I wish to say that I entirely agree with what McCardie J. has said about *Bentley v. Black*. (3) Only two points were there taken and this was not one of them. I also agree that where the directors of a company acknowledge that a shareholder is entitled to rectification of the register they may assent to this being done without the necessity of an application to the Court.

Appeal dismissed.

Solicitors for plaintiffs : *Churchill, Smallman & Co.*

Solicitors for defendant : *Frost, Ward & Co.*

(1) (1871) L. R. 7 Ch. 55.

(2) L. R. 4 H. L. 64, 74.

(3) 9 Times L. R. 580.

J. S. H.

[IN THE COURT OF APPEAL.]

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Feb. 3.

JEFFERSON AND OTHERS v. DERBYSHIRE FARMERS,
LIMITED.

[1919. J. 1631.]

Negligence—Dangerous Object—Duty to handle with Care—Benzol—Motor Garage—Master and Servant—Smoking—Scope of Employment.

The owner of a motor garage leased it to a firm of motor engineers who agreed with the defendants to give them the use of it as a garage for motor lorries. A youth employed by the defendants in the garage, while drawing motor spirit from a drum into a tin, struck a match, lit a cigarette, and then threw the match on the floor. This set light to some oil and petrol lying about the floor; the fire spread to the motor spirit flowing from the drum, and the garage and its contents were consumed.

In an action by the owner and the lessees of the garage against the defendants for the negligence of their servant:—

Held, that the servant being engaged in an act which was within the scope of his employment, and required special caution, and having failed to exercise caution, was guilty of negligence in the course of his employment, and that the defendants were liable for the resulting damage.

Williams v. Jones (1865) 3 H. & C. 602 distinguished.

Judgment of Horridge J. affirmed on other grounds.

APPEAL from the judgment of Horridge J. in an action tried before the learned judge without a jury at Derby and London.

The plaintiff Jefferson was the owner of a motor garage at Ashbourne in the county of Derby. By an indenture dated May 2, 1919, he demised the garage to the plaintiffs A. R. Atkey & Co., Ltd., a firm of motor engineers, for a term of twenty-one years from March 25, 1919, at the rent of 220*l.* a year, with a proviso that the rent should be suspended if the premises should be rendered uninhabitable by fire.

By a memorandum of agreement dated August 12, 1919, and made between Atkey & Co. and the defendants, Atkey & Co. agreed to garage for a period of one year from the date thereof such of the defendants' motor lorries and Ford car as should be sent to them for that purpose (the lorries not to exceed four in number at any one time) for the sum of 93*l.* per annum to be paid as therein provided. The agreement contained the following stipulations:—"Messrs. A. R.

C. A. Atkey & Co., Ltd., to provide heating in the winter, a petrol
 1921 store for keeping oil and sundry parts, and use of water supply
 JEFFERSON for washing. The Derbyshire Farmers, Ltd., not to store
 v. motor spirit in drums in the garage. All motor spirit to be
 DERBYSHIRE stored in the petrol shed provided. The said A. R. Atkey
 FARMERS, & Co., Ltd., shall incur no liability with respect to damage to
 LD. any of the said motor lorries and Ford car through fire while
 the same are on their premises."

On August 13, 1919, a youth named Charles Booth, who was a loader in the employment of the defendants, was ordered by one of the defendants' drivers to fill some tins with benzol. Booth rolled a 50-gallon drum of benzol inside the garage and raised it on to a trestle or thrall with the help of another person in the defendants' employment. The tap was already in the drum. He proceeded to turn the tap in order to fill a 2-gallon tin. What happened then is thus described in his evidence at the trial:—"I was lighting a cigarette; I threw the match down on the floor; it lit some petrol on the floor and then spread to the benzol in the barrel." One of the witnesses saw Booth emptying the benzol from the drum into the tin. The drum was in the garage on a sort of plank thrall on which cars are run up for repairs. This witness said: "The next thing I saw was Booth standing in a pool of flame. When I got from under my car to go to the flames I saw the benzol tap turned full on. No one could turn it off." As a result the garage was burnt down.

The plaintiff Jefferson sued the defendants to recover damages for the loss of his building, and the plaintiffs Atkey & Co. sued in the same action for the loss of a motor cab and other personal property and for having been deprived of the use of the garage for the purposes of their business. It was agreed that, if the defendants were liable to both plaintiffs, Jefferson should recover 450*l.* and Atkey & Co. 309*l.*

Horridge J., after having considered *Bayley v. Manchester, Sheffield, and Lincolnshire Ry. Co.* (1); *Dyer v. Munday* (2);

(1) (1872) L. R. 7 C. P. 415.

(2) [1895] 1 Q. B. 742.

and *Williams v. Jones* (1), held that the last-named case concluded the plaintiffs from contending that Booth, in lighting the cigarette and throwing down the match, was acting within the scope of his employment. But he held that to bring a drum of motor spirit into the garage, and to fill tins there, was a storing of motor spirit in a drum in the garage and a breach of the agreement of August 12, 1919, and upon this ground he gave judgment for the plaintiffs.

The defendants appealed.

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Disturnal K.C. and H. H. Joy for the appellants.

(1.) Horridge J. was wrong in holding that the respondent Jefferson could recover for breach of a contract between the appellants and Atkey & Co., to which he was not a party.

(2.) The learned judge was wrong in holding that to bring a drum of benzol into the garage and there fill tins from it was a breach of the agreement "not to store motor spirit in drums in the garage." Even if it was, the destruction of the garage was not the natural or probable consequence of the breach.

(3.) The real cause of the damage was the act of Booth in smoking while drawing the benzol from the drum. This act was not in the scope of his employment, and therefore the appellants are not liable for its consequences. "A person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so intrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant (2), but in the course of the employment": *Bayley v. Manchester, Sheffield, and Lincolnshire Ry. Co.* (3) per Willes J., approved in the Court of Appeal in *Dyer v. Munday* (4) by Rigby L.J. Upon

(1) 3 H. & C. 602.

6 C. & P. 501, 503.

(2) Or "on a frolic of his own,"
per Parke B. *Joel v. Morison* (1834)

(3) L. R. 7 C. P. 415, 420.

(4) [1895] 1 Q. B. 742.

C. A. the question whether Booth in lighting the cigarette was
1921 acting in the scope of his employment, *Williams v. Jones* (1)
JEFFERSON is conclusive. In that case a carpenter making a sign-board
v. in the plaintiff's shed lit his pipe from a shaving, dropped
DERBYSHIRE the shaving, and set fire to the shed ; and it was held that
FARMERS, it was not in the course of his employment to light his pipe
LD. and smoke.

[ATKIN L.J. If he had been making gunpowder instead of a sign-post the decision might have been otherwise : *Dominion Natural Gas Co. v. Collins*. (2)]

The presence of danger cannot bring the act of smoking within the scope of a servant's employment ; it tends rather to exclude it.

Cautley K.C. and *T. N. Winning* for the respondents were not called on.

BANKES L.J. This appeal raises questions of some importance in view of modern conditions. There is no dispute about the facts. The plaintiff Jefferson had let a motor garage to the plaintiffs, Atkey & Co., Ltd., for a term of years, and was the owner of the reversion expectant on the determination of the lease. Atkey & Co. entered into a contract with the defendants to house their motors at an inclusive price per annum. The agreement was in writing. It will be necessary in a moment to refer to its terms. On August 13, 1919, a youth of 16 years named Booth, who was employed in and about the garage by the defendants, was emptying a drum of motor spirit into tins in the garage. As he commenced he lit a cigarette and threw the match on the floor, which was covered with petrol and oil. The petrol and oil were set alight by the match ; the floor took fire, and, the motor spirit continuing to pour from the drum, the garage was burnt down.

The two plaintiffs, Jefferson and Atkey & Co., brought an action against the defendants. They based their claim on two grounds : first, that the defendants were liable to both

(1) 3 H. & C. 602.

(2) [1909] A. C. 640, 646.

of them because of the negligence of their servant Booth in the course of his employment; and, secondly, they contended that the act of Booth in emptying the drum in the garage was a breach of the contract between Atkey & Co. and the defendants. The learned judge found for the defendants on the first point. On the second point he found for both the plaintiffs, holding that there had been a breach by the defendants of the contract between them and Atkey & Co. In no circumstances could Jefferson recover for a breach of the contract between the defendants and Atkey & Co., to which he was not a party, and that part of the judgment cannot stand. But as between the defendants and Atkey & Co. it is still necessary to consider whether Horridge J. was right in his construction of the clause in the contract as to storing motor spirit in drums within the garage. I cannot take the view which the learned judge took of this stipulation. The contract was in writing. It was dated August 12, 1919. It provided that Atkey & Co. should garage for one year a Ford car and such of the defendants' motor lorries as should be sent to them for that purpose, and that Atkey & Co. should provide a petrol store for keeping oil. It also provided that the defendants should not store motor spirit in drums in the garage, but that all motor spirit should be stored in the shed provided. It is not possible to find in the express words of the contract any prohibition against taking a drum which had been stored and removing it into the garage. The prohibition is against storing. In my opinion to take a drum into the garage and there empty it is not to store motor spirit in a drum in the garage. The only question is whether it is possible to imply from the express words a contract that the defendants would not empty a drum in the garage. There is something to be said for this contention, inasmuch as the obligation concerning motor spirit in drums and petrol is imposed by two separate portions of the agreement. But I do not think this is enough to warrant the inference that the parties must have intended to prohibit the emptying of drums in the garage. Therefore I cannot agree with the learned judge in this part of his judgment.

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As to the other point, that upon which the defendants succeeded, we have heard much discussion as to how far smoking can be said to be within the scope of a servant's employment. Fortunately it is not necessary to give any decision on that question, because this case can be disposed of on much more satisfactory grounds. It is not disputed that it was in the scope of Booth's employment to empty motor spirit from drums into tins and to do that in the garage. That act being by its nature within the scope of his employment, it was his duty to do that part of his work with reasonable care. To smoke and throw a lighted match on the floor while doing this work was not to do the work with reasonable care, and therefore a cause of action was established which avails both the plaintiffs.

The learned judge decided this case chiefly on a point of law, conceiving himself bound by *Williams v. Jones* (1). There is this distinction between that case and the present. In the present case the negligent act of the boy was in itself a negligent performance of the work he was employed to do. In *Williams v. Jones* (1) the negligent act of the carpenter was unconnected with the work he was employed to do. The judges in that case did not differ on any question of law, but as to the proper inference to be drawn from the fact that the man lit his pipe while working at a sign-board. Keating J., who delivered the judgment of the majority of the Court, based it upon the opinion of the judges forming the majority that the act of the workman was so exceptional that it was comparable with the act of firing off squibs at intervals during his work and could be placed in the same category as a mere pastime. A master cannot be made responsible for what a workman does while engaged in acts of that kind. Blackburn J., however, took a different view. After stating the rule governing the liability of masters for the torts of their servants in the course of their employment, and citing a passage from the judgment of Parke B. in *Quarman v. Burnett* (2), he said this: "In the present case the difficulty is to apply these rules to the facts. It is said that Davies, the servant, was not employed by his

(1) 3 H. & C. 602, 610.

(2) (1840) 6 M. & W. 499, 509.

master to smoke or to light his pipe, and that is no doubt true ; but the act of lighting a pipe was in itself a harmless act ; it only became negligent and a breach of duty towards the plaintiff because it was done when using his shed and working there amongst inflammable materials. Had the action been brought against Davies himself, it could not have been maintained for merely lighting his pipe, but that under the circumstances would have been evidence that he failed to take reasonable care when using the plaintiff's shed and working there, which would have been the true ground of action." In my opinion that case turned upon the inference which the majority of the judges drew from the facts, and, so far from being an authority in favour of the defendants, I think it leads to the conclusion that in this case the Court would have held the defendants liable. For these reasons, which are not the reasons given by the learned judge, I think that this appeal fails and must be dismissed.

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WARRINGTON L.J. I am of the same opinion. The plaintiffs based their claims on two alternative grounds : (1.) on the express terms of the contract between Atkey & Co. and the defendants, and (2.) on a breach of that obligation which a person undertakes who is using the property of another towards that other and towards third persons who may be injured by the user. Horridge J. decided in favour of the plaintiffs upon the first branch of the claim. I say no more than this, not having heard counsel upon the point, that I can see no reason for holding that the plaintiff Jefferson can have any ground of claim upon the contract to which he was not a party. As to the plaintiffs Atkey & Co., I am not satisfied that the learned judge was right in holding that any breach of contract had been committed in moving a drum of motor spirit from the shed into the garage and filling a tin from it there.

As to the second point, there was no difference of opinion among the judges in *Williams v. Jones* (1) as to the duty which the law imposed upon the defendant. I take the

(1) 3 H. & C. 602.

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statement of Blackburn J. (1) as a correct description of the duty, only substituting the garage in this case for the shed in that case. The duty which the law casts on a person using the garage is to take reasonable care that no damage or injury should be occasioned by the use thereof by him and his servants. Have the defendants in this case taken reasonable care? Their servant Booth was employed to pour benzol from drums into tins. Pouring motor spirit from drums into tins is an operation involving danger from fire unless precautions are taken. There is no doubt or question that the fire was caused by the negligent act of Booth. It would have been a negligent act to smoke at all in the immediate neighbourhood of the spirit. Still more was it a negligent act to light a match while the spirit was flowing from the drum. Horridge J. decided in favour of the defendants on this point on the ground that what the boy did in lighting and throwing away the match was not in the scope of his employment. In one sense it was not; he was not employed to light the match and throw it away; but that is not the way in which to approach the question. It was in the scope of his employment to fill the tin with motor spirit from the drum. That work required special precautions. The act which caused the damage was an act done while he was engaged in this dangerous operation, and it was an improper act in the circumstances. That is to say, the boy was doing the work of his employers in an improper way and without taking reasonable precautions; and in that case the employers are liable. *Williams v. Jones* (2) is distinguishable, because the making of a sign-board is not in itself a dangerous operation demanding the exercise of any precautions. The act of the carpenter in lighting his pipe had no connection with the work he was engaged to perform. That act was no breach of any duty to exercise due care and caution in the work on which he was engaged, because the work on which he was engaged was not dangerous. But the work on which Booth in the present case was engaged was dangerous, and that makes all the difference. ^{$\frac{1}{2}$} In the result therefore I think the learned

(1) 3 H. & C. 609.

(2) 3 H. & C. 602.

judge came to the right conclusion, though not for the reasons he assigned.

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ATKIN L.J. I agree. Apart from authority I think the liability of the defendants in this case rests on a very simple principle. A master is liable for the act of his servant in the course of his employment if the act is negligent. Whether an act is negligent or not depends on the circumstances of the case. The servant must exercise reasonable care and skill in the circumstances in which he is called upon to act, and this duty is more imperious when the servant is handling articles dangerous in themselves such as loaded fire-arms, poisons, explosives, or the like : *Dominion Natural Gas Co. v. Collins*. (1) It could not be disputed that benzol is an article of that kind. In dealing with these and the like substances there is a special duty to take precautions that no damage shall accrue either to bystanders or to adjoining property by reason of explosion, fire, or other injury. If this boy had begun to do the dangerous act he was authorized to do, drawing benzol from a drum, with a stranger standing close by him and smoking, that would have been a want of due precaution on the part of the boy ; and a fortiori if, instead of another person smoking, he was himself smoking while pouring out the benzol. It is irrelevant to consider whether he was authorized by his employers to smoke. He was authorized to draw the benzol, and he was doing that act negligently, for the evidence shows that tapping the drum and lighting the cigarette were contemporaneous acts. He was therefore guilty of a negligent act within the scope of his employment.

The only remaining question is, Did that act directly contribute to the loss ? It is established as matter of fact that it did. The learned judge has found the defendants liable for a breach of their contract not to store motor spirit in drums within the garage. He must therefore have found that the act which in his view was a breach of contract, but which I think was a tort, directly contributed to the loss. It follows that both plaintiffs are entitled to succeed. In *Williams v.*

(1) [1909] A. C. 640, 646.

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Jones (1) there was not much difference among the learned judges as to the law; the difference was as to the proper inference from the facts. The majority of the Court held the opinion that in making the sign-board, the act which Davies, the defendant's servant, was employed to do, he was guilty [of no negligence, but that the negligence if any was in the act of smoking, which he was not employed to do. Thence the inference was easy that smoking was not in the scope of Davies's employment. But apart from that case, I find it impossible to distinguish the present case from *Musgrove v. Pandelis* (2), where it was held that a motor car charged with petrol and ready to start was a dangerous object which came within the principle of *Rylands v. Fletcher*. (3) In my opinion a drum of benzol being tapped in a garage is equally within the principle of that case.

As to the other points raised, I doubt whether there was any breach of the contract between Atkey & Co. and the appellants; and even if there was, I cannot as at present advised see how the plaintiff Jefferson could recover for the breach.

Appeal dismissed.

Solicitors for appellants : *Pattinson & Brewer, for Flint, Son & Marsden, Derby.*

Solicitors for respondents : *Hamkins, Grammer & Hamlin, for Bendle W. Moore, Derby.*

(1) 3 H. & C. 602.

(2) [1919] 2 K. B. 43.

(3) (1868) L. R. 3 H. L. 330.

Applied. MIDDLETON
v. BALDOCK
[1950] 1 K. B. 657

Applied. R.M.R.
HOUSING SOCIETY LD.
v. COMBS
[1951] 1 K. B. 486

[IN THE COURT OF APPEAL.]

BARTON v. FINCHAM.

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Jan. 24, 25 ;
Feb. 8.

Emergency Legislation—Landlord and Tenant—Notice to quit by Tenant—Agreement to yield up Possession—Statutory Tenancy—Recovery of Possession—Contracting out of Act—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 5.

By s. 5, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: "No order or judgment for the recovery of possession of any dwelling house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless (a) any rent lawfully due from the tenant has not been paid, or any other obligation of the tenancy (whether under the contract of tenancy or under this Act) so far as the same is consistent with the provisions of this Act has been broken or not performed; or . . . (c) the tenant has given notice to quit, and in consequence of that notice the landlord has contracted to sell or let the dwelling house or has taken any other steps as a result of which he would, in the opinion of the Court, be seriously prejudiced if he could not obtain possession. . . ."

The landlord of a house to which the above enactment applied, wishing to sell the house with vacant possession, made an agreement in writing with his tenant that in consideration of a present payment the tenant should give notice to quit and should peaceably yield up possession on a certain day. The landlord made the payment and the tenant gave the notice to quit; but when the day arrived the tenant refused to give up possession.

The landlord brought an action for possession. No evidence was given that he had, otherwise than as aforesaid, contracted to sell or let the house or taken any other steps as a result of which he would be seriously prejudiced if he could not obtain possession:—

Held, that the jurisdiction of the Court to make an order for possession is restricted by the above enactment; that if the conditions upon which alone an order can be made are not fulfilled, an order cannot be made in invitum notwithstanding any agreement of the parties to the contrary; and that consequently the landlord could not recover.

APPEAL from the decision of a Divisional Court on appeal from the county court of Surrey holden at Croydon.

The defendant, Mrs. Fincham, was and had been for twelve years the tenant of a house to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied, and had paid her rent monthly. The plaintiff had bought the house subject to the tenancy. He desired to sell the house with vacant possession. He therefore made an agreement with the

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defendant that she in consideration of 20*l.* should give him notice to quit, and should peaceably yield up possession at Michaelmas, 1920. The agreement was in writing dated July 22, 1920, and signed by the defendant; the 20*l.* was duly paid by the plaintiff, and notice to quit was duly given by the defendant. When Michaelmas arrived the defendant refused to give up possession, but she did not repay or tender the 20*l.* The plaintiff brought an action in the county court to recover possession of the house and mesne profits.

No evidence was given that the plaintiff had, otherwise than as aforesaid, contracted to sell or let the house or taken any other steps as a result of which he would be seriously prejudiced if he could not obtain possession.

The county court judge gave judgment for the plaintiff and made an order for possession. The defendant appealed to the Divisional Court. The judges in the Divisional Court, Lush and McCardie JJ., were agreed that the plaintiff could not rely on the defendant's notice to quit, as he had given no evidence that he would be seriously prejudiced if he could not obtain possession; but they disagreed as to the effect of the defendant's agreement to yield up possession at Michaelmas, 1920; Lush J. considered that the agreement was against public policy and unenforceable; McCardie J. took the opposite view. The appeal was therefore dismissed.

The defendant appealed.

Sir Albion Richardson for the appellant. The county court judge had no jurisdiction to make an order for possession. An order can only be made in certain events specified in s. 5, sub-s. 1, of the Act of 1920. The conditions applicable to this case are those contained in sub-s. 1 (c), and they have not been fulfilled. At the close of the plaintiff's case it was the duty of the county court judge to dismiss the action for want of jurisdiction: *Farquharson v. Morgan* (1); *Vacher v. London Society of Compositors*. (2) No agreement between the parties can confer on an inferior Court a jurisdiction beyond the limits imposed by its constitution. The appellant is a statutory

(1) [1894] 1 Q. B. 552.

(2) [1912] 3 K. B. 547; [1913] A. C. 107.

tenant whose tenancy can only be determined in accordance with the Act : *Artizans Dwellings Co. v. Whitaker*. (1)

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Vachell K.C. and *Coumbe* for the respondent. This Act was passed for the benefit of the tenant. It is a well known maxim "Quilibet renuntiare potest juri pro se introducto." The Act contains no express provision depriving a tenant of his freedom of contract, and the Court will not lightly infer an intention to do so : *Griffiths v. Earl Dudley*. (2) Sect. 15, sub-s. 2, of the Act contemplates agreements between landlords and tenants as to the surrender of the demised premises.

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Sir A. Richardson in reply. If the tenant could by contract renounce his benefits under the Act the whole object of the Legislature would be frustrated.

Cur. adv. vult.

Feb. 8. The following written judgments were delivered.

BANKES L.J. The material facts of this case are as follows : A landlord of a dwelling house to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applies was anxious to obtain vacant possession of the house. He made an agreement with his tenant by which in consideration of an immediate payment of 20*l.* she agreed to give him notice to quit on September 29 then next and undertook to peaceably yield up the premises with vacant possession on that date. The agreement which is dated July 22, 1920, was reduced into writing and signed by the tenant. The 20*l.* was paid and the notice to quit was given. When September 29 arrived the tenant refused to give up possession, but kept the 20*l.*

Upon this state of facts several interesting questions of law arise—namely, whether the landlord was entitled to take legal proceedings to recover possession ; whether he could bring an action against the tenant either to recover damages for failing to carry out her agreement, or to recover back the 20*l.* ; and whether the tenant became liable to pay double rent under the Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 18.

The landlord commenced proceedings in the county court, claiming possession and mesne profits. It does not clearly

(1) [1919] 2 K. B. 301.

(2) (1882) 9 Q. B. D. 357.

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appear that the tenant at the trial before the county court judge took the point that under s. 5 of the Increase of Rent Act, 1920, no order or judgment for the recovery of possession could be made against her. I will assume that the point was taken, as otherwise there would be no right of appeal. The county court judge decided in favour of the landlord, and made an order for possession. The tenant appealed. The judges in the Divisional Court were agreed that the landlord could not rely upon the tenant's notice to quit, as he had given no evidence that he would be seriously prejudiced if he could not obtain possession, and without such evidence the provisions of s. 5, sub-s. 1 (c), of that Act had not been complied with; but they disagreed as to the effect of the tenant's agreement to give up possession on the date named. Lush J. considered that the agreement was against public policy and consequently unenforceable. McCardie J. took the opposite view. The appeal was consequently dismissed, and the tenant appeals to this Court.

Each of the learned judges stated very fully the reasons for the conclusion at which he had arrived. I take a view of the statute which renders it unnecessary to discuss many of the grounds upon which the learned judges arrived at their decisions, or any point of law arising upon the facts, except the one point raised in the county court—namely, whether the landlord was entitled to an order for possession. The objects which the Legislature had in view in passing the various Increase of Rent and Mortgage Interest (Restrictions) Acts appear to me clear. As to the objects of the Act of 1920 in particular, they are conveniently stated in the side notes to the sections of that Act. Those objects include restriction on increasing rent and mortgage interest, restriction on the right to possession, restriction on the levy of distress for rent, restriction on calling in mortgages, and restriction on premiums. The means adopted by the Legislature for securing these various restrictions are very different. In the case of rent a standard is fixed, and any rent in excess of that standard is declared by the statute to be irrecoverable from the tenant notwithstanding any agreement to the

contrary. In the case of mortgages the Act declares that it shall not be lawful for any mortgagee, except in the permitted cases, to call in his mortgage or take any steps for enforcing the security or for recovering the principal money. In the case of premiums, in addition to allowing the recovery of the amount paid, it is made a punishable offence to require any payment or consideration in contravention of the provisions of the section. In the case of the restriction on the right to possession s. 5 provides as follows: "No order or judgment for the recovery of possession of any dwelling house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless" Then follows in a series of sub-sections a list of the instances in which an order or judgment may be made or given. It appears to me that the Legislature in reference to claims for possession has secured its object by placing the fetter, not upon the landlord's action, but upon the action of the Court. The language used is so clear and precise that there is in my opinion no room for cutting down or restricting the operation of the section. The Legislature has definitely declared that the Court shall exercise its jurisdiction only in the instances specified in the section, and in no others. Both learned judges in the Court below attached considerable weight to the provisions of s. 15, sub-s. 2, of the Act, as indicating that the Legislature contemplated agreements between landlord and tenant for valuable consideration in reference to the giving up of possession. I do not think that this sub-section can be read as indicating any intention on the part of the Legislature to recognize contracting out of the Act on the part of landlord and tenant. Sect. 15 is the section which seeks to define the statutory position of a person who continues in occupation of premises merely because the statute will not allow of his being ejected. Sub-s. 2 was introduced to prevent the statutory tenant making a profit out of his position by taking money or any form of consideration for letting some third person other than his landlord into possession. Both parties to the transaction are rendered liable to conviction. It seems obviously necessary to exclude a landlord who may be

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C. A. willing to pay something to a tenant for vacant possession from this penalty. It is for this reason only, as I think, that

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any reference is made in the sub-section to the landlord, and I cannot give to the sub-section the force attributed to it by McCardie J. In my opinion s. 5 is an instance of a case where the Legislature has in clear and unmistakable language restricted the jurisdiction of the Court, and where no agreement between parties can give the Court a jurisdiction which the Legislature has said it is not to exercise. This is by no means the only statute in which the Legislature has secured the object it had in view by limiting the exercise by the Courts of their full jurisdiction. It is true that in some cases the strictness of this limitation has been relaxed by the pleading rule which, while rendering the pleading of a statutory defence optional, declares that unless pleaded it cannot be relied on. No point of this kind arises in the present case, as I assume that all necessary conditions had been fulfilled entitling the appellant to raise the statutory defence in the county court. I see no ground for sending the case back for a new trial, and under these circumstances I am of opinion for the reasons I have given that the county court judge had no jurisdiction to make any order for possession, and this appeal must be allowed with costs here and below and judgment entered for the appellant with costs.

SCRUTTON L.J. Mrs. Fincham had been a tenant of a small house for over twelve years, paying rent monthly. Mr. Barton bought her house and was anxious to resell it, and for that purpose to get vacant possession. He therefore made an agreement with Mrs. Fincham that she should peaceably give up possession at Michaelmas, 1920, and give him notice that she would quit on that date in consideration of 20*l.* paid her. That sum was paid, but the lady changed her mind when Michaelmas came, and Mr. Barton accordingly applied to the county court judge for recovery of possession, the grounds alleged being the tenant's notice to quit and her agreement to quit. The county court judge made an order for recovery of possession, but

unfortunately we have no information as to the ground on which he proceeded, or his view of the agreement. On appeal to the Divisional Court its members differed, Lush J. taking the view that it was contrary to public policy to contract out of the Act; McCardie J. that it was not. Accordingly the judgment of the county court judge stood. There was then an appeal to this Court.

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The position of a tenant who, having agreed in his contract of tenancy to give up possession on a named day, holds over and stays in possession after that day, has been explained by this Court in *Remon's Case* (1), and I do not repeat it. It is enough to say that he becomes a statutory tenant at his own will and cannot without his consent be ejected either by peaceable entry or by the order of a Court unless the conditions mentioned in s. 5 of the Act of 1920 are present and the Court makes an order. He retains possession of the dwelling house by virtue of the provisions of the Act of 1920, as stated in s. 15, sub-s. 1, of that Act, and the provision entitling him to stay in is s. 5, which determines how alone he can be turned out. He can leave of his own free will, surrendering his tenancy, which is probably the principal matter described as "any other reason determining the tenacy" in s. 15, sub-s. 3. But if he is in possession and unwilling to give it up, possession can only be obtained by order of a Court, which order can only be made if certain specified facts are proved. One of these facts is that an obligation of the tenancy, so far as the same is consistent with the provisions of this Act, has been broken. This qualification was necessary, for every tenancy contains an obligation to deliver up possession at the end of the tenancy, of which obligation staying in possession is a breach. The qualification was not contained in the Act of 1915, but was held, I think rightly, by Astbury J. in *Artizans Dwellings Co. v. Whitaker* (2) to be necessarily implied, as without it the whole sub-section would be meaningless. A tenant who agrees in the contract of tenancy to give up possession on a named day does not contract out of the Act, and the agreement does not prevent

(1) [1921] 1 K. B. 49.

(2) [1919] 2 K. B. 301.

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the provisions of the Act from applying, and it is difficult to see why an agreement to the same effect made after the contract of tenancy should have any better results. Further s. 5, sub-s. 1 (c), which deals with the case where the tenant has given notice to quit, requires a further fact before the Court can act thereon—namely, that in consequence of the notice the landlord has contracted to sell or let the house or taken any other steps which would result in his being seriously prejudiced if he could not obtain possession. A mere notice to quit is not enough, and the case, judging by the particulars of claim in the county court, does not seem to have been based on s. 5, sub-s. 1 (c), at all, but only on the agreement. I am of opinion that the powers of the Court to make orders is limited by the conditions of s. 5, and unless one of these is proved the order cannot be made. The case of an agreement to give up possession is not provided for except by s. 5, sub-s. 1 (a), which renders it an insufficient ground for an order. It follows that the decision of the county court judge was erroneous.

We were asked to order a new trial, apparently that an attempt might be made to bring the case under s. 5, sub-s. 1 (c); but the landlord had not put the case forward in his particulars or apparently in his argument, and there are no findings of fact relevant to the case. The point being fought was the effect of the agreement. It was urged that the effect of our decision would be to prevent agreements in Court. If the tenant is willing to go out, I do not see why any order is wanted; let him go; but as at present advised I do not see any reason why the judge on being satisfied that a tenant is then ready to go out (not that he was once willing but has changed his mind) should not make an order for possession.

This view of the case, based on *Remon's Case* (1) and on the provisions of the Act, renders it in my view unnecessary to consider the point on which the judges below differed. Some provisions of the Act such as ss. 1 and 3, sub-s. 2, as to increase of rent, are clearly unaffected by any agreement. The agreement in this case does not on the face of it show

any reference to or knowledge of the provisions of s. 5 of the Act which it is supposed to exclude. I do not desire to hold out any encouragement of the view that a landlord of small property may make it a term of all his lettings that s. 5 of the Act shall not apply; but further than this I do not think it necessary to discuss the numerous arguments used or authorities cited both before us and in the Court below.

The appeal must be allowed and the judgment set aside with costs here and below. The question whether the 20% is recoverable is not before us. The legal advisers of the landlord are as capable as I am of deciding whether they can get any help in their difficulties from the decision of this Court in *Flannagan v. Shaw*. (1)

ATKIN L.J. I agree with the other members of the Court in thinking that the express provisions of s. 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, make it impossible to uphold the decision of the learned county court judge. The section appears to me to limit definitely the jurisdiction of the Courts in making ejectment orders in the case of premises to which the Act applies. Parties cannot by agreement give the Courts jurisdiction which the Legislature has enacted they are not to have.

If the parties before the Court admit that one of the events has happened which give the Court jurisdiction, and there is no reason to doubt the bona fides of the admission, the Court is under no obligation to make further inquiry as to the question of fact; but apart from such an admission the Court cannot give effect to an agreement, whether by way of compromise or otherwise, inconsistent with the provisions of the Act.

I do not myself think that this question is affected by the County Court Rule as to giving notice of a statutory defence. A Court of limited jurisdiction cannot increase its jurisdiction by a pleading rule, and is bound itself to take notice of a defect of jurisdiction appearing on the face of the proceedings. On these short grounds, which appear to have been adopted

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(1) [1920] 3 K. B. 96.

C. A. amongst others by Lush J., I think that his judgment was in
 1921 substance right. I see no reason in the circumstances of
 BARTON this case for ordering a new trial, and I agree that the appeal
 v. should be allowed and judgment entered for the defendant
 FINCHAM. with costs here and below, the costs in the county court on
 Atkin L.J. the scale allowed below to the plaintiff.

Appeal allowed.

Solicitors for appellant : *Seaton Taylor & Co.*

Solicitor for respondent : *J. Bransbury.*

W. H. G.

C. A.

[IN THE COURT OF APPEAL.]

1920

Nov. 24, 25 ; MANN MACNEAL AND STEEVES, LIMITED v. CAPITAL
 Dec. 20. AND COUNTIES INSURANCE COMPANY, LIMITED.

[1919. M. 2050.]

SAME v. GENERAL MARINE UNDERWRITERS,
 LIMITED.

[1919. M. 2290.]

*Insurance (Marine)—Hull and Machinery—Dangerous Cargo—Material Fact
 —Disclosure—Waiver—Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 18.*

By s. 18, sub-s. 1, of the Marine Insurance Act, 1906, "Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known to him. If the assured fails to make such disclosure, the insurer may avoid the contract."

By sub-s. 2. "Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

By sub-s. 3. "In the absence of inquiry the following circumstances need not be disclosed, namely:— . . . (b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know ; (c) Any circumstance as to which information is waived by the insurer."

Policies of insurance were effected upon the hull and machinery of a named vessel at and from ports in the United States to ports in France, while there, and back again to ports in the United States. The vessel was an American wooden four-masted motor schooner described in her register as a gas screw auxiliary schooner. She carried a quantity of petrol for her own use. At the date of the insurance the owners had engaged the vessel to carry 100,000 gallons of petrol in 2500 iron drums from New Orleans to Bordeaux; but this fact was not disclosed to the underwriters. She carried this cargo in safety to France, but on her return journey to the United States she was totally lost through one of the perils insured against. Petrol in drums was not an unusual cargo for vessels crossing the Atlantic.

Actions having been brought upon the policies, the underwriters pleaded that the policies were voidable from non-disclosure of the engagement to carry the 2500 drums of petrol:—

Held, by Bankes, Atkin, and Younger L.J.J., that the policies were valid because the underwriters by abstaining from inquiry had waived disclosure of the engagement.

By Younger L.J., on the further ground that the engagement was upon the facts not a material circumstance.

Judgment of Greer J. reversed.

C. A.

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INSURANCE
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APPEAL from the judgment of Greer J. in actions tried before the learned judge without a jury.

Early in February, 1919, the plaintiffs Mann Macneal and Steeves, Ltd., a firm of insurance brokers, effected with the defendants the Capital and Counties Insurance Co., Ltd., an insurance to the amount of 1500*l.* at a premium of 5*l.* per cent. upon the auxiliary schooner *Elmir Roberts*. The insurance was effected by the plaintiffs on behalf of themselves and of the owners of the vessel and was subsequently embodied in a policy dated April 17, 1919, which declared it to be an insurance lost or not lost at and from “any port ^{and}/_{or} ports, place ^{and}/_{or} places in the United States Atlantic ^{and}/_{or} Gulf to any port ^{and}/_{or} ports place ^{and}/_{or} places in France while there and thence return to port ^{and}/_{or} ports in the United States Atlantic ^{and}/_{or} Gulf with privilege to use ports en route.” It was also agreed that the subject matter of the policy should be “Hull and machinery, &c., valued at \$175,000. Subject to Institute Time clauses attached. Hulls (internal engines) combustion form as original.” The perils insured against included perils of the seas, fire, “and all other perils, losses, and misfortunes that

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have come or shall come to the hurt, detriment, or damage of the aforesaid subject matter of the insurance or any part thereof." The Institute Time clauses included the following clause: "Held covered in case of any breach of warranty as to cargo, trade, locality, or date of sailing provided notice be given and any additional premium required be agreed immediately after receipt of advice."

The plaintiffs effected a second insurance for 974*l.* with the same defendants at the same date and on the same terms.

At the same time and by a policy of the same date the plaintiffs effected a third insurance with the defendants the General Marine Underwriters, Ld., for 2000*l.* upon terms substantially the same as those of the policies already mentioned.

The plaintiffs brought actions against both defendants upon their respective policies, and the actions were tried together.

The *Elmir Roberts* was an American wooden four-masted motor schooner, built in 1918, of 784 tons gross and 695 tons net registered tonnage and of 1461 tons dead-weight capacity. Her certificate of registry described her as a gas screw auxiliary schooner. On January 24, 1919, her owners had engaged her to carry from New Orleans to Bordeaux for the Michelin Tyre Co. 2500 drums of gasoline, an explosive substance and very dangerous when exposed to the air. On or about February 22 the vessel started on her voyage having loaded the 2500 iron drums, each drum containing about 40 gallons of gasoline. She also carried barrel staves, called French claret staves, to the number of 103,245 under deck and 47,841 on deck. She had also on board for fuel 540 gallons of gasoline in iron drums, 450 gallons of oil in barrels, 330 gallons of crude oil in tanks, and 330 gallons of kerosine. She arrived at Bordeaux on May 25 and there discharged her cargo without mishap.

On July 23 she was chartered to the United States Government. Under this charterparty she loaded a cargo of empty shells and mixed ammunition and sailed from Bordeaux for New York on July 26. On August 22, while she was on this

voyage, a kerosine lamp burst in the hands of an engineer and fell on the floor of the engine room. First the floor caught fire, then the fuel oil. The fire then spread to the rest of the ship, which was abandoned by the crew and, after burning for some hours, exploded and was totally lost.

The defendants pleaded that at the time when the insurances were effected the plaintiffs wrongfully concealed from the defendants the material fact then known to the plaintiffs and unknown to the defendants that the owners of the *Elmir Roberts* had entered into the freight engagement with the Michelin Tyre Co. for the carriage of the 2500 drums of gasolene to Bordeaux.

Greer J. held that the fact of this freight engagement was a material circumstance within the meaning of s. 18, sub-ss. 1 and 2, of the Marine Insurance Act, 1906 (1), and that it was not one of those material circumstances which under sub-s. 3 need not be disclosed. He therefore gave judgment for the defendants in each case.

The plaintiffs appealed.

MacKinnon K.C. and *Simey* for the appellants. The learned judge came to a wrong conclusion. This was an insurance on hull. It must often happen that particulars of the cargo which will be carried cannot be given at the date of the insurance. Therefore it is not usual to disclose particulars of the cargo when effecting an insurance on hull. But even if it were an insurance on cargo, an assured is not bound in every case to make a full disclosure of all facts relating to the cargo. Some information may be waived by the insurer. The law is correctly stated in Halsbury's Laws of England, Title "Insurance" (2): "The assured is not bound to disclose any information which is waived by the insurer. Speaking generally, where from the facts communicated to the underwriter he would naturally infer the existence of other facts not disclosed, his omission to make inquiry is an implied waiver of a more explicit disclosure." Thus in *Boyd v.*

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(1) See headnote.

(2) Vol. xvii., s. 801, p. 410.

C. A. 1920 *Dubois* (1) Lord Ellenborough held that a cargo owner insuring a cargo of hemp was not bound to disclose that the hemp was damaged. On the same principle where the Governor of an island in the East Indies in time of war with the French insured a fort on the island, Lord Mansfield held that he was not bound to disclose unasked the facts that the French had meditated a descent upon the island a year before the insurance was effected, and that the fort was ill prepared to resist an attack: *Carter v. Boehm*. (2) So on an insurance on a ship at and from a certain port the assured need not, unless he is asked, state facts making it probable that the ship may be detained at the port beyond the time necessary for loading her cargo: *Beckwith v. Sydebotham* (3); and on an insurance of a ship at and from London, lost or not lost, it was held that the assured need not state that the ship had sailed twenty-four days before the date of the policy: *Fort v. Lee*. (4) To the same effect are *Freeland v. Glover* (5); Arnould on Marine Insurance, s. 618 (6); Duer on Marine Insurance. (7) Similarly a charterer insuring a profit on his charter need not state, unless he is asked, that the ship was chartered to him at a lump sum freight: *Asfar & Co. v. Blundell*. (8) In these and the like cases the insurer can ask for information if he desires it and can protect himself by warranty if he does not choose to incur a particular risk. At the time when this insurance was effected it was common knowledge that large quantities of dangerous goods were being carried between France and the United States, yet this policy contains no warranty against ammunition or explosives. The truth is that the underwriters accepted the risk of a dangerous cargo which added little to the perils of a voyage in a vessel like the *Elmir Roberts* carrying for her own use substances as dangerous as the gasoline complained of.

Raeburn K.C. and *van den Berg* for the Capital and Counties

(1) (1811) 3 Camp. 133.

(2) (1766) 3 Burr. 1905.

(3) (1807) 1 Camp. 116.

(4) (1811) 3 Taunt. 381.

(5) (1806) 7 East, 457.

(6) 9th ed. (1914), vol. i., p. 793.

(7) Vol. ii., Lect. 13, ss. 40, 41, pp. 444 et seq.

(8) [1896] 1 Q. B. 123.

Insurance Co. The question whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact: Marine Insurance Act, 1906, s. 19, sub-s. 4. It is not ad rem to contend that the respondents took the risk of a dangerous cargo; what was put upon them was not the risk but the certainty of a dangerous cargo. Greer J. has held that this certainty was a material circumstance, and how can it be said that there is no evidence to support his finding? The fact that a ship was under contract to carry a dangerous cargo on a voyage would surely influence the judgment of a prudent insurer in fixing the premium for insuring her on that voyage. If so, it is a material circumstance: Marine Insurance Act, 1906, s. 18, sub-s. 2; *Scottish Shire Line v. London and Provincial Insurance Co.* (1); Arnould on Marine Insurance, s. 604. (2)

Stuart Bevan K.C. and *James Dickinson* for General Marine Underwriters relied upon the same argument.

MacKinnon K.C. in reply.

Cur. adv. vult.

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Dec. 20. The following written judgments were delivered:—

BANKES L.J. The claims in these actions, which were tried together, were upon two policies of marine insurance both dated April 17, 1919, upon the hull and machinery of the auxiliary schooner *Elmir Roberts* for a voyage from places in the United States and elsewhere to places in France and back again. The vessel completed her voyage from the United States to Bordeaux safely, but was totally destroyed by fire on the return voyage to the United States. The claims were for a total loss. The defences included a plea of concealment of a material fact—namely, that the owners of the *Elmir Roberts* had, before the insurance was effected, entered into a freight engagement for the carriage in the said vessel of 2500 drums of gasoline from the United States to Bordeaux. Greer J. who tried the actions held that the plea of concealment of a material fact was made out, and he gave judgment for the defendants. All parties called evidence at the trial.

(1) [1912] 3 K. B. 51, 70.

(2) 9th ed., vol. i., p. 780.

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The question for this Court is whether the learned judge came to a correct conclusion upon the evidence. With regard to the vessel herself there was no dispute. She was one of a class built in America during the war. She was a wooden vessel of about 690 tons net register tonnage with auxiliary motor engines. The engines of such a vessel are run with fuel oil, and a considerable quantity of petrol is carried in tanks in the engine room, for the purpose of heating the hot bulb of the engines, and for working the small petrol engines which drive the winches. The quantity of petrol so carried by this vessel would probably be from 300 to 400 gallons.

It is conceded by all parties that this class of vessel is regarded as an extremely hazardous risk, owing to the use of petrol under the above circumstances. Quite a number of witnesses said that they would not take a line on such a vessel, whatever her cargo might be. The gasolene, or petrol as it is called in England, which formed part of the cargo of this vessel was contained in 2500 iron drums. Each drum contained about 40 gallons, so the total quantity carried was about 100,000 gallons. The owners of the vessel had entered into a contract to carry these drums before the proposal for the insurance was made. Petrol contained in iron drums was proved to be quite an ordinary and common form of merchandise to be included as part of a general cargo to be carried across the Atlantic.

The plaintiffs' case was that in the case of an insurance upon hull it was no part of the duty of the assured to make any disclosure to the underwriter with reference to the cargo, but that it was the underwriter's business, if he wished to know anything as to the nature of the cargo, to make the necessary inquiries. The defendants' case, on the other hand, was that even in the case of an insurance upon hull it was the duty of the assured to make full disclosure of every material circumstance connected with the cargo to be carried. In cross-examination the witnesses for both parties had to modify the general proposition contained in these contentions. For instance, the plaintiffs' first witness admitted that he could not contend that there would not be a duty to disclose the

fact that dynamite formed part of a cargo, or that an entire cargo consisted of petrol; and several of the defendants' witnesses admitted that if quite small quantities of such articles as matches or cotton formed part of a cargo there would be no duty to disclose that fact, though there would be a duty to disclose the fact if considerable quantities of either were to form part of a cargo.

It appears to me to follow from this evidence that so far as the present case is concerned it must be accepted that the question whether disclosure must be made or not is one of degree, depending upon the circumstances of each particular case. Certainly upon the evidence given in this case it would appear that no rule can be laid down that under no circumstances where the insurance is one upon hull is there any duty upon the assured to make any disclosure as to the nature of the cargo. It does, however, appear from the evidence that the general rule prevailing in reference to insurances upon hull is that no disclosure in reference to the nature of the cargo to be carried is either made by the assured, or expected by the underwriter. This appears to be quite in accordance with what Lord Ellenborough conceived should be the rule: see *Boyd v. Dubois* (1); and it seems to me from the nature of things that no other practice could be expected to prevail. The duty, if duty there be, to make any disclosure can only be a duty to disclose some matter in relation to cargo already fixed or undertaken to be carried. In order, therefore, to qualify himself to make a valid contract of insurance the broker must keep himself posted as to what freight engagements have been entered into up to the moment of making the contract of insurance, and he must have sufficient information as to the exact nature and quantities of each parcel covered by those engagements to enable him to decide what disclosure he should make. The inconvenience, not to say practical impossibility, of carrying on this class of business under such conditions, particularly where a broker is acting for a client abroad, convinces me that some such general rule as that spoken to by the plaintiffs' witnesses

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must be in existence. This conclusion is strongly supported by the fact that no reported case can be found in which the suggested duty to make the disclosure contended for by the defendants has been held to exist.

In deciding this case the learned judge had to apply s. 18 of the Marine Insurance Act, 1906, to the facts before him. He decided that the fact that a freight engagement had been entered into for the carriage of this very considerable quantity of gasolene upon this particular vessel before the proposal for insurance was made was a circumstance which was material as being likely to influence the judgment of a prudent underwriter in fixing the premium, or determining whether he would take the risk. I cannot say that he was wrong in so deciding. It becomes necessary, therefore, to consider the second branch of the learned judge's finding in reference to the question whether the assured was excused from making any disclosure of this material circumstance under sub-s. 3 of s. 18, either because he must be presumed to have known it, or because under the circumstances he must be taken to have waived it. The learned judge has not dealt with the question of waiver, presumably because the point was not made in argument before him, and he has held that though the insurer must be presumed to have known that some portion of the cargo of this vessel would very possibly consist of drums of gasolene, he did not know, and must not be presumed to have known, that 2500 drums had actually been fixed at the time that he entered into the contract of insurance. This fine distinction leads one to doubt the soundness of the view that the circumstance of these drums being actually fixed was a material circumstance ; but as I have already said I do not think it is possible upon the evidence to interfere with that part of the judge's judgment.

I do, however, consider that the appellants are entitled to succeed upon either of two grounds with which the learned judge does not deal. In the first place, I think that the evidence as to the practice in relation to the non-disclosure of the character of cargo when effecting a policy on hull does not only allow, but requires, the Court to hold that an

underwriter waives any information in relation to what may be fairly described as a parcel of ordinary cargo of lawful merchandise, which this parcel was. In the second place, I think that the plea of waiver can be supported on the ground indicated by Lord Esher M.R. in *Asfar & Co. v. Blundell* (1), where in dealing with the question of concealment he says: "But it is not necessary to disclose minutely every material fact; assuming that there is a material fact which he"—the assured—"is bound to disclose, the rule is satisfied if he discloses sufficient to call the attention of the underwriters in such a manner that they can see that if they require further information they ought to ask for it." In my opinion the disclosure in the present case that this vessel was a wooden vessel with auxiliary motor engines was a disclosure of the fact that it was proposed to carry cargo from the United States to France in a vessel specially and dangerously liable to fire damage, and that such a disclosure was, within Lord Esher's language, a sufficient disclosure to put the underwriter on inquiry. Having regard to the language of the material section of the Marine Insurance Act, 1906, in which the law relating to concealment is now contained, the conclusion is rather that disclosure had been waived than that it had not been made; but the result is the same, so far as the appellants' case is concerned.

On these grounds I think that the appeal succeeds and that the judgment entered for the defendants must be set aside and judgment entered for the plaintiffs for the amount claimed with interest, with costs here and below.

ATKIN L.J. The subject of insurance in this case was the schooner *Elmir Roberts*, a wooden ship built in 1918 having auxiliary internal combustion engines. Her net register tonnage was 695, and her dead-weight capacity 1461 tons. She was insured on hull with the defendants. The plaintiffs who effected the insurance in their own names as well as for whom it might concern, are a firm of Liverpool insurance brokers who were acting for the American owners. The

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(1) [1896] 1 Q. B. 123, 129.

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ship was insured at and from any port or ports in the United States of America to any port or ports in France, whilst there, and thence returning to any port or ports in the United States of America. The vessel was lost by fire and explosion consequent thereon on her return voyage from Bordeaux to New York. The defendants rely on concealment by the plaintiffs of the fact that at the time the contract of insurance was made the owners had made a freight engagement whereby the vessel was bound to carry on her outward voyage from the United States of America to France a part cargo of gasoline in drums, which they allege was a dangerous cargo. In fact the vessel did carry this cargo in safety to France. I mention the fact to discard it, for it appears irrelevant to the question whether the existing contract to carry the cargo was a material fact which ought to have been disclosed.

The law upon the matter is to be found in s. 18 of the Marine Insurance Act, 1906. The learned judge has found that the freight engagement was a material circumstance within the definition in sub-s. 2, for he thinks that it would have influenced the mind of a prudent insurer both in fixing the premium and in determining whether he would take the risk. I am not sure that I should have come to the same conclusion, in view of the fact that this small wooden cargo vessel possessed auxiliary internal combustion engines and therefore had to carry in the engine-room a store both of crude oil and of petrol, facts which were known to the insurers and would seem to indicate more peril than the cargo in question. But there certainly was evidence upon which the judge could so find, and I am not at all prepared to say that I am satisfied that the finding was wrong.

The question remains whether the assured was excused from disclosure by the provisions of sub-s. 3. I have come to the conclusion that this was a circumstance as to which information was waived by the insurer, and, therefore, under sub-s. 3 (c) it did not need to be disclosed. It is a remarkable fact that in the long history of the English law of marine insurance in which the doctrine of concealment has played a prominent part there is no record of any decided case in

which an underwriter on hull has ever successfully relied on a concealment with reference to the kind of cargo contracted to be carried. In spite of some suggestion to the contrary, the evidence in this case, especially that of Mr. Ashley, the only independent underwriter called for the defendants, satisfies me that in ordinary practice the assured does not give, nor does the insurer demand, information on this topic. This would correspond, I am convinced, with the general experience of those engaged in marine insurance work. One of the reasons no doubt is that insurance on hull is frequently, perhaps usually, effected before particular freight engagements are made, or, at any rate, are completed; and in insurances for time, often before any forecast could be made of the nature of such engagements. The insurer knows that cargo will be carried and he is prepared to take the chance of what the cargo will be. Another reason probably is that from the nature of the business any complete disclosure is from a business point of view impossible. Marine insurances are effected in ordinary course by agents, insurance brokers, whose knowledge and duty to disclose is in substance deemed to be co-extensive with that of their principals. Shipowners and others interested in hull would have to prepare and hand over to their brokers full particulars of freight engagements, including in the case of a general ship possibly hundreds of items lest one of them should in nature and extent be capable of being deemed a material circumstance; these particulars or the doubtful items would have to be shown by a prudent broker when offering the risk to each underwriter. Whether the doctrine of waiver be based on a collateral contract expressed or implied, or upon a representation express or implied acted upon by the person to whom it is addressed, it appears to me that the nature of the business relations between the respective parties leads necessarily to the inference that the insurer waives disclosure of the nature of the cargo contracted to be carried. He is presumed to know matters of common knowledge and matters which an insurer in the ordinary course of his business as such ought to know. Amongst such matters would be, in the present case, that the vessel insured was a

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 1920 United States of America to France, and that the cargo might
 consist of petrol in drums. If he objects to insuring such a
 cargo he can protect himself by making an inquiry, or by
 insisting on a warranty against such cargo. If he does not,
 it appears to me that the nature of the transaction demands
 the inference that he must be deemed to represent to the
 assured that the nature of the cargo need not be stated.
 Greer J. says with force that while the insurer may be prepared
 to risk the chance of a hazardous cargo, he must not be taken
 to be prepared to incur the certainty of a hazardous cargo.
 I feel the weight of this, but I think the answer is that included
 in the risk he takes is the risk that there is an already con-
 cluded engagement for hazardous cargo, just as there is the
 countervailing possibility that he runs no risk of a hazardous
 cargo at all, by reason of an absolutely safe cargo having been
 agreed. In truth this view seems to be disposed of by
 authority. If an insurer insures a private warship from port
 to port he need not have disclosed to him the special
 adventure, "because he knows some expedition must be in
 view; and, from the nature of his contract, without being
 told, he waives the information": per Lord Mansfield, in
Carter v. Boehm. (1) If he insures a ship "at and from"
 a foreign port he need not have disclosed to him the fact that
 the ship has needed in that port substantial repair, for he
 knows that such a circumstance is probable: *Beckwith v.*
Sydebotham. (2) So on a similar insurance "lost or not lost"
 the assured need not disclose that the ship at the date of the
 insurance has left the port on the insured voyage for some
 considerable period: *Fort v. Lee* (3), a decision of the Court
 of Common Pleas when Sir James Mansfield was Chief Justice
 and Sir Soulden Lawrence one of the judges. The period in
 that case was twenty-four days. In all the above cases
 disclosure was held unnecessary, though in all of them the
 circumstance appears to have been material, and to be a fact
 known to the assured at the time of making the contract.

(1) 3 Burr. 1905, 1911.

(2) 1 Camp. 116.

(3) 3 Taunt. 381.

I do not think that the reasons I have given for this decision necessarily apply to the case of a cargo which is unusual and of exceptionally hazardous character, such as the case put in argument of a cargo of dynamite. I should like to consider the circumstances of such a case when it arises. In the present case, though I always hesitate before differing from the learned judge, I have formed the opinion that he should have given judgment for the plaintiffs, and I think that the appeal should be allowed.

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YOUNGER L.J. We are here concerned with insurances upon the hull of an oil-driven auxiliary wooden schooner, the *Elmir Roberts*, on a round voyage from any port or ports in the United States to any port or ports in France, there, and back. At the date of insurance a freight engagement had been made, by virtue of which the vessel was to carry as part of her cargo on her outward voyage some 2500 drums of gasoline said by the defendant underwriters in these proceedings to be dangerous merchandise. No mention of this engagement was made to the underwriters by the plaintiffs, the brokers effecting the insurance; they were in truth themselves ignorant of the transaction at the time, although that fact is not in the circumstances relevant or material. The respondents seek by reason of the non-disclosure to escape liability from the claims made against them in these actions in respect of the subsequent loss of the schooner on her return voyage. Greer J. has held that they are entitled to relief, and the plaintiffs appeal to this Court.

The learned judge found that there was in the circumstances stated a concealment by the brokers of a fact that was material, and that the non-disclosure was not excused by any circumstance known or presumed to be known to the underwriters. His judgment goes no further. He did not in it consider or discuss the question fully canvassed before us—namely, whether the circumstance relied on was not one as to which information was waived by the defendants. That topic was not, I gather, definitely raised before him in argument.

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With reference to the matters with which the learned judge did deal in his judgment, while I express the opinion with much diffidence, I do gravely doubt whether the reasoning by which he reached his conclusion that the non-disclosure of this freight engagement was so material as he held it to be really had regard to the true criterion by reference to which in relation to this marine risk the issue of materiality falls, as I think, to be determined. The learned judge, as I read his judgment on this issue, is not influenced directly or otherwise by the character and construction of the vessel on which the drums of gasoline were to be carried, and on whose hull the insurances were effected, the most material circumstance, as it seems to me, in the case. He has, so to speak, labelled this gasoline as dangerous cargo in the abstract, as merchandise which, when included in a general cargo from America by any vessel open to carry such cargo, substantially increases the risk of an insurance upon her hull, as goods so attended with hazard beyond the common that their certain inclusion as part of cargo to be carried deprives the insurer of his useful chance that nothing so dangerous to the safety of the ship will be on board during the voyage insured. Not that the learned judge was not well entitled to deal with this question as he did; much of the evidence given before him seemed plainly to convey that everything that could be said against these gasoline drums on a steel or iron ship would a fortiori apply to them when on a wooden ship, and perhaps most of all on an auxiliary wooden vessel like the *Elmir Roberts*. But a careful consideration of all the evidence in the case, the testimony from all sides, impresses me with the conviction that the only aspect of the matter with reference to which the statements just referred to are well-founded has little if any relevance to the question of materiality in relation to this particular risk when looked at from what I conceive, upon the whole evidence, to be the only proper standpoint. For while it is undoubtedly true that the presence of such a cargo, whether on a well-found iron or steel ship or on a wooden sailing, steam, or auxiliary oil vessel, may seal the fate of the vessel should the gasoline caught by the

fire explode, and will do so with greater certainty in the case of a wooden vessel than in the case of one otherwise constructed, the relevant distinction for present purposes between the well-found iron or steel ship and such a vessel as the *Elmir Roberts* is that the first class of ship need not, in the event of fire, be at risk of destruction at all, apart from the presence of the gasoline amongst her general cargo, while in the case of a vessel like the *Elmir Roberts* it approaches certainty that in the event of a fire breaking out sufficiently serious to reach, if unimpeded, the drums in the hold, her fate would be irrevocably sealed, long before the flames got so far, by the intermediate burning of her own stores of oil fuel and of any other general cargo—in the present case, for instance, the 600 tons of claret staves stowed in the near hold and on deck—more immediately inflammable than gasoline itself and equally effective to bring about the total destruction of this vessel. In other words, the evidence I think clearly shows that if the vessel was to be lost at all by fire it would be only in the remotest contingency that these gasoline drums, stowed away in her hold as they were, would play any effective or other part in bringing about her destruction. That this is so appears, as it seems to me, from a consideration of the evidence both with reference to this type of vessel and with regard to the nature of these gasoline drums.

Bankes L.J. has just described the *Elmir Roberts* type of vessel, an American product of the war. I will not repeat his description. The evidence with reference to these vessels demonstrates, as I think, their faulty construction, their grave liability to destruction from fire breaking out in the engine-room, the danger spot, saturated in its wood-work with oil, and the extreme difficulty of preventing the spread of such a fire if it once establish itself. The story of the *Elmir Roberts's* final destruction recorded in the correspondence supplies a striking corroboration of these conclusions, which were so strongly held by many underwriters that they would take no line on such vessels at all, their record of loss, apart from all questions of cargo,

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Now in all these circumstances it is important to note the exact findings of the learned judge. It seemed to him quite clear that the existence of the engagement to carry the 2500 drums of gasolene was a material fact, and that the insurers could not be presumed to know it. What he held they must be presumed to know was that the vessel would be open to carry that quantity if she had not been already fixed, but not that she was already fixed to carry it, and he proceeds as follows : "It seems to me that the fact that she was then definitely fixed to carry these dangerous goods makes all the difference, because any insurer who was told that would know at the time

definitely that he was not going to get a cargo which may be partly composed of other goods, and that he was being asked to make an insurance on a cargo which had been definitely fixed to the extent of 2500 drums of this dangerous material." In this passage the learned judge adopts the suggestion made to us by Mr. van den Berg in his very able argument. I think it fails on the facts. This cargo may in the abstract be properly described as dangerous. So far I am content to accept the learned judge's finding. In relation to this adventure, however, the result of the evidence is, I think, clearly to show that, as a part of any normal average general cargo from America, it cannot be so described. In my view, in this connection, it was probably less and certainly not more dangerous than were the claret staves to which, it was admitted, no objection could have been taken even if they, like the gasoline, had been at the date of insurance the subject of an agreement for carriage on this outward voyage.

Speaking for myself therefore I should for these reasons be prepared to allow the appeal on the ground that, as the defendants must be presumed to know that the vessel would be open to carry the gasoline in question, the additional fact that a contract to carry these drums had been entered into made no material difference to the risk they are presumed to have undertaken. But if I be wrong so far, the considerations already stated add further force to the circumstances immediately relevant on the question of waiver, with which Atkin L.J. has just dealt so fully. I have had the advantage of reading his judgment, and if I may say so, I concur entirely with it on this point, both in its reasoning and in its conclusions. I would only for myself venture to add one further word upon it. I do not conceive that the conclusions reached both by my Lord and Atkin L.J. on this question of waiver have the effect of weakening the governing statutory principle that a contract of marine insurance is a contract based upon the utmost good faith. I do not doubt that the Courts must be at all times instant to see that this essential principle is never impinged upon. The views now expressed are, however, called for not only by the practice but by the

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necessities of marine insurance business as now conducted ; they do little more than extend to voyage policies principles which must ex necessitate rei obtain in connection with time policies, and they are so far justified not only by the absence from the books of any decision to the contrary of them, but by the existence in America, if we may judge from the passage from Duer cited by Mr. Mackinnon (1), of an absolute rule there to the same effect. Nor, as it seems to me, is the principle adopted in these judgments, while necessary for the due conduct of business, injurious to any interest that requires protection even under these contracts uberrimae fidei. Every nervous or sceptical underwriter can always protect himself by a clause of warranty or by inquiry ; and if there be on the part of the insuring broker, even in such a matter as we are here dealing with, any fraudulent concealment, the underwriter will of course be relieved unless the fraudulent broker discharges the very heavy burden of establishing affirmatively that the fraud which he perpetrated for the purpose of influencing the underwriter's judgment was in fact in no way effective to lead him to accept the risk on the terms agreed.

In my judgment, these appeals should be allowed

Appeals allowed.

Solicitors for appellants : *William A. Crump & Son.*

Solicitors for Capital and Counties Insurance Co., Ltd. : *Ballantyne, Clifford & Co.*

Solicitors for General Marine Underwriters, Ltd. : *Thomas Cooper & Son.*

(1) Vol. ii., Lect. 13, s. 41, p. 446.

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REID v. BRITISH AND IRISH STEAM PACKET
COMPANY, LIMITED.

Employer and Workman—Injury—Compensation—Accident arising out of Employment—Wilful Assault by Docker upon Foreman Supervisor—“Workman”—“Person employed otherwise than by way of manual labour”—Remuneration exceeding 250l. per Annum.

The applicant was a quay foreman in the employ of the respondents. His duty was to supervise gangs of dock labourers. While so engaged he was wilfully assaulted by one of the men and sustained a severe injury to his eye whereby he was totally incapacitated, and for which he sought compensation under the Workmen's Compensation Act, 1906. At the time of the injury he was receiving 21l. a month from the respondents, by whom he had been employed for twenty years, his engagement being determinable by one month's notice. The county court judge made an award in his favour. The respondents appealed on the grounds: (1.) that the injury was not due to an accident arising out of the employment; (2.) that the applicant was not a “workman” within s. 13 of the Act. There was evidence that he occasionally lent a hand to the men, but his substantial duty was that of supervision only:—

Held, that the injury was caused by an accident arising out of and in the course of the employment.

Trim Joint District School v. Kelly [1914] A. C. 667 followed.

Held further, however, that the applicant was not a “workman” within the Act, his substantial employment being supervision and not manual labour, and his remuneration exceeding 250l. a year.

Griffith v. Penrhyn Castle (Owners of) [1917] 1 K. B. 474; *Jaques v. Tug Alexandra (Owners of)* (unreported); and *In re Dairymen's Foremen and In re Tailors' Cutters* (1912) 107 L. T. 342 followed.

APPEAL from an award of the judge of the City of London Court, sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant, Reid, was employed by the respondents at their wharf as a quay foreman. His duty consisted in the supervision and control of the men who were employed as dock labourers in the work of loading and unloading ships at the wharf. On November 26, 1919, while in the discharge of his duties, the applicant had occasion to give orders to one of the men to perform some work which he ought to have done. For no apparent reason the man violently assaulted

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him and inflicted a serious injury to one of his eyes, so that for all practical purposes he lost the sight of it, and, as he was at the time suffering from impaired vision of the other eye, he was totally incapacitated from performing the work on which he was formerly employed. He accordingly made a claim for compensation as for an accident under the Act. At the time of the assault he was earning 21*l.* a month, his employment being determinable by one month's notice on either side. His duty was to engage, and supervise the work of, gangs of men who were employed by the respondents. There was some evidence that, when there was a pressure of work at the wharf, he would occasionally lend a hand by way of assisting the men who were working under him.

There was also evidence that the men were of a rough type, but assaults by them upon the foremen had not previously occurred.

At the hearing of the arbitration two questions arose: (1.) Whether the injury to the applicant was caused by an accident arising out of his employment; and (2.) whether he was a "workman" within the meaning of s. 13 of the Act.

The county court judge decided both points in favour of the applicant and awarded him compensation accordingly.

The respondents appealed on the grounds:—

1. That the judge was wrong in law in holding that the applicant was a workman within the meaning of the Act.

2. That he was wrong in law in holding that the applicant was injured by accident arising out of and in the course of his employment.

3. That there was no evidence on which the judge could find that the injury arose out of the employment.

Holman Gregory K.C. and *Duckworth* for the appellants. The applicant was not injured by an accident arising out of his employment. There is no evidence that the liability to assault was a special risk of the employment. *Trim Joint District School v. Kelly* (1) does not therefore apply: *Weekes v. Stead*. (2) Secondly, the applicant is not a "workman"

(1) [1914] A. C. 667.

(2) (1914) 83 L. J. (K. B.) 1542.

within the meaning of the Act. His real work was supervision, and he was not engaged by way of manual labour. Such manual labour as he did was merely incidental to his employment: *In re Dairymen's Foremen and In re Tailors' Cutters* (1); *Jaques v. Owners of the Tug Alexandra*. (2) Moreover, his remuneration exceeded 250*l.* a year, and he is therefore outside the Act: *Griffith v. Owners of S.S. Penrhyn Castle*. (3)

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Neilson K.C. and *Garland* for the respondent. The county court judge has found that the man was not employed otherwise than by way of manual labour, and there was evidence on which he could so find. His finding cannot be disturbed. The man's remuneration did not exceed 250*l.* a year. There was no certainty that he would earn more than that amount, because his engagement might be terminated on a month's notice.

When s. 13 of the Workmen's Compensation Act, 1906, says "remuneration exceeds 250*l.* a year" it does not mean remuneration at a rate which if the man could earn it throughout the year would give him more than 250*l.* for the year: *Mackay v. Owners of S.S. Cramond*. (4)

LORD STERNDALÉ M.R. This case raises two or three difficult points, but two of them are, in my opinion, governed by authority, either in this Court or in the House of Lords, and therefore it is not necessary to discuss them at any length. [His Lordship stated the facts and continued:] In those circumstances three questions have been raised. One is that this was not an accident which arose out of the course of the applicant's employment, because it was a wilfully wrongful act on the part of the man who struck him, and it was not a risk incidental to his employment that he should be so struck. The county court judge has found that it was, and the noble and learned Lords who delivered judgment in *Trim Joint District School v. Kelly* (5) all stated that it was a question

(1) 107 L. T. 342.

(2) (1920) Unreported.

(3) [1917] 1 K. B. 474.

(4) (1920) W. C. & Ins. Rep. 219.

(5) [1914] A. C. 667.

C. A. of fact, and a question of degree to be decided in each particular case. In that case the man, who was unfortunately

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killed by a concerted assault, was a schoolmaster in an industrial school. There had been assaults before in the school and several of the boys were rough and unruly. In this case there is evidence that the men with whom the applicant had to do, and over whom he had to exercise supervision and discipline, were a rough lot, and probably anybody who has experience of dock labourers would think that was not, at any rate manifestly, an untrue description. It is quite true that no evidence was given that any assault on a man in this position was known, either to the applicant himself, or to any of the witnesses who were called. He did say he had heard of an assault upon a ship's foreman, but whether an assault by a dock labourer on a ship's foreman would be relevant to an assault on a quay foreman, I do not discuss. If the men were in the habit of assaulting foremen at all, I should think the description of foremen would not matter very much, but at any rate there was no real evidence of any previous assault upon any foreman at all.

Was it open to the learned judge upon that evidence to find that an assault of this kind arose out of the employment? It seems to me that it was, because, if you put a man in command to exercise supervision and discipline over a lot of men who are described as a rough lot, and given to fighting at times, although not often, if ever, within the dock premises, it does not seem to me that it is impossible to draw the inference that there is a possibility, if not a probability, of the man being assaulted, over and above the probability or possibility of the ordinary citizen being assaulted; I mean by the ordinary citizen a man who has not got to control and direct men of a rough character. Although I think it is a matter to be seriously considered by the judge in coming to his conclusion of fact, I cannot think that the fact that no assault had previously been committed is conclusive to show that it was not a risk incidental to the man's employment. It appears to me that there was evidence upon which the judge could find as he did, and, if so, then the case comes

entirely within the authority which I have mentioned. It is quite true that that was the decision of a House divided, I think, in the proportion of four to three of the noble and learned Lords; but we have no right to discuss that, we must take the decision as it is, and, in my opinion, upon that point this case falls entirely within that authority.

On the next point also it seems to me that the case is concluded by authority, not, I am sorry to say this time, by the House of Lords, but by a judgment in this Court to which I was a party. I am glad to hear that that case is going to the House of Lords, because it would be a very great advantage to us to have an authoritative definition of the meaning of s. 13 of the Workmen's Compensation Act, 1906. It begins in this way: "Workman does not include any person employed otherwise than by way of manual labour whose remuneration exceeds 250*l.* a year." In *Jaques v. Owners of the Tug Alexandra* (1) this Court adopted the definition which was given by the late Master of the Rolls sitting as a judge of first instance, of the meaning of "employed otherwise than by way of manual labour." What that learned judge said was, that the question whether a person is employed otherwise than by way of manual labour within the meaning of that section is to be determined by considering whether any manual labour that he may do in the course of his service is the real substantial work for which he is engaged, or whether it is only incidental or accessory thereto; if it be the latter, the employment is not in manual labour. Until that definition, which was adopted in this Court, is corrected or said to be wrong we must follow it. Adopting and following that definition, I have the gravest doubt whether there was any evidence that this man was engaged in manual labour at all. He was a quay foreman, and his evidence was to this effect. He said, I very often handle goods under pressure of work; I was expected to do this by the manager, to give a man a hand if necessary. It appears from the shorthand note of the evidence that when he was asked in cross-examination whether persons in

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(1) Nov. 18, 1920. Unreported.

C. A. authority had ordered him to do manual work, and a
 1921 Mr. Higgins was mentioned, he said : " No, he never ordered
 REID me." He was then asked whether Mr. Higgins had asked
 v. him, and he said : " He may have done ; I cannot say for
 BRITISH certain." Then another gentleman, a superintendent, was
 AND IRISH referred to, and what the applicant said about him was :
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 PACKET Co. " On several occasions he has asked me to give a hand in
 Lord Sterndale handling cargoes." He was asked how often, and replied :
 M.R. " When they were pressed, which was not very often." Then
 he was asked to say what this gentleman had said to him,
 and he said : " He has often said to me when the ship was
 nearly finished, ' Well, Reid, we are going slow here, can you
 push them along a bit ? ' and I have done it." Being asked :
 " That would be quite consistent with his telling you to work
 with more despatch ? " he said : " Yes, he would expect me
 to perform the work." With regard to other persons who
 were mentioned, he said that a Mr. Harling had ordered him
 to do manual labour, but when he was asked again about it
 he said : " He has asked me at times to give a hand and I
 have done it ; it was not exactly an order, but he simply
 asked me." That, I think, is the strongest part of his evidence.
 I doubt very much whether that was evidence that he was
 engaged to do manual labour within the definition I have
 mentioned ; but witnesses were called on the other side
 and they denied that this man's engagement was to do manual
 labour at all. They said he might. One witness said he might
 have put his hand to stop a bale falling or something of that
 kind, and I think they admitted he might from time to time
 have lent a hand, but they said that was not part of his duty.
 His duty was to supervise, and if he were to do the manual
 work regularly like the other men, he would be very much
 less use as a foreman, because he had to look after, not one
 gang, as the learned judge seems to have thought, but three
 or four. He had to distribute them to different places where
 they had to work, and see that the work was properly done.
 There therefore was, even if what he said was some evidence
 of his being engaged in manual work, evidence to the contrary,
 and the learned county court judge, with the greatest respect

to him, seems to me to have misdirected himself upon this matter. He misdirected himself, I think, because he took the test as being that the man should be engaged only in supervision, and never in manual labour; but, taking that erroneous test, he summed up his finding as to the man's duties in this way. He said: "He is a man who goes and looks and, in the main, sees that the work is done, but from time to time he is occasionally required to lend a hand." That is the finding of the county court judge, and that finding seems to me to bring the man entirely within the principle of the definition adopted by this Court: *Jaques v. Alexandra Towing Co.* (1) I think, therefore, that this man was engaged otherwise than in manual labour within that definition.

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The next point is whether he was a man whose remuneration exceeded 250*l.* a year. That arises upon this state of facts. He was at the material time earning 21*l.* a month, and would continue to earn 21*l.* a month until the employment was terminated by one month's notice. It is quite true that it could be terminated before the end of the year, and it was argued for the respondents that in accordance with *Griffith v. Owners of S.S. Penrhyn Castle* (2) and *McKay v. Owners of the Cramond* (3), it must be shown either that he had in fact in the last year earned over 250*l.*, or that he had a contract which could not be determined within a year, under which he got more than 250*l.*, before he could be said to be a man whose remuneration exceeded 250*l.* a year. I do not think that is the true result from either of those cases. *McKay v. Owners of the Cramond* (3) was a case of pilots at Barry Dock who were not serving under any engagement at all, but were earning dues by working as pilots. They had an association in which they pooled all the takings, and for the month or two for which the applicant in that case had been working, his earnings had been 6*l.* a week, but there was no engagement at 6*l.* a week; there was no continuous employment at all, and there was no evidence to show that that was in any way a customary sum, or that he had any real ground for

(1) Unreported.

(2) [1917] 1 K. B. 474.

(3) (1920) W. C. & Ins. Rep. 219.

C. A. expecting that the 6*l.* a week would continue. There was no
 1921 evidence about it, and therefore that differs entirely from
 REID this case. So does *Griffith v. Owners of S.S. Penrhyn Castle* (1),
 v. because the facts there were that the applicant was a marine
 BRITISH superintendent for the owners of the vessel, the *Penrhyn*
 AND IRISH *Castle*. He was the shore man, a retired captain, earning
 STEAM about 130*l.* a year, but he had, as a special employment,
 PACKET Co. been asked by the owners to go in command of this vessel, the
 Lord Sterndale *Penrhyn Castle*, because they were short of a master, and
 M.R. to go on a voyage, the extreme limit of which would not
 exceed six months, and therefore during those six months
 he was earning what, if continued for a year, would have
 amounted to more than 250*l.* a year ; but he had no continuous
 engagement at all, nor was there any reason to anticipate
 that he would continue, after the expiration of that voyage,
 to earn that amount of money. The facts, therefore, were
 different, but there were statements and definitions of what
 the learned judges in that case thought was the meaning of
 the words to which I have referred, which we followed, and
 indeed were bound to follow in *McKay v. Owners of the*
Cramond. (2) I notice that Scrutton L.J. in *Griffith v.*
Owners of S.S. Penrhyn Castle (3) said : “ To satisfy the words
 of the Act it must be shown that there is a contract of employ-
 ment which, unless determined by notice or by some
 extraneous fact such as death or the destruction of the subject
 matter of the contract, will last a year and produce a
 remuneration of over 250*l.* ; and it is not enough to show a
 contract for less than a year at a remuneration of less than
 250*l.*, as a six months’ contract for 150*l.*” Warrington L.J.
 I think practically adopted the same test. If the argument
 for the respondent be correct, it would produce this result,
 that if a man were earning 500*l.* a year, but there was power
 to terminate that yearly agreement by a three months’
 notice, he would not be a man whose remuneration exceeded
 250*l.* a year. I do not think that can be the meaning of it.
 If Scrutton L.J.’s interpretation of the section be applied to

(1) [1917] 1 K. B. 474.

(2) (1920) W. C. & Ins. Rep. 219.

(3) [1917] 1 K. B. 474, 479.

this case, it seems to me that this man's remuneration clearly exceeded 250*l.* a year. He had been in the respondents' employment for over twenty years, they were thoroughly satisfied with him, and he and they were on thoroughly good terms, and they continued him at this time in their employment at 21*l.* a month. That would continue for a year unless terminated by notice, assuming the man to live and the company to carry on business, and there was every human probability that the employment would go on, and would not be terminated by notice. I think that that is evidence upon which the county court judge could find as he did that the man's remuneration exceeded 250*l.* a year.

I think, therefore, that that point fails, and that the appeal must be allowed on the ground that this man was a man whose remuneration exceeded 250*l.* a year, and who was employed otherwise than by way of manual labour. The appeal must be allowed, and there must be an award for the respondents.

SCRUTTON L.J. The applicant in this case is a foreman over gangs engaged in loading and discharging ships at a wharf on the Thames, and he claims compensation under the Workmen's Compensation Act, and alleges that the accident he has met with in his employment is that he was assaulted by one of the labourers whom he was employed to supervise, and by that assault he has lost the sight of one eye.

The first point is whether that was an accident which arose in the course of and out of his employment. We are bound by the majority decision of the House of Lords in *Trim Joint District School v. Kelly* (1), and I take it that that case lays down that acts of violence deliberately intended to injure, though not accidents from the point of view of the person who inflicts the injury, may be accidents from the point of view of the person who suffers the injury, and that it is a question of fact in each case whether the risk of assault is merely one which is common to any subject of His Majesty equally with the person who has suffered it, or whether there is some special risk of assault to the particular person arising

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C. A. from his employment. In this case the county court judge has
 1921 found that there is a special risk to a foreman of dock gangs
 REID on the Thames of assault by the dockers who compose the
 v. gangs. There was in my view evidence from which the county
 BRITISH court judge could come to that finding, and if as a judge I
 AND IRISH am allowed to use my own knowledge I should entirely agree,
 STEAM from my knowledge of dockers, with the finding of the county
 PACKET Co. court judge.
 Scrutton L.J.

The second and third points are points which are becoming of very great importance nowadays, because 250*l.* a year pre-war is not the same as 250*l.* post-war, and under the provision which shut out of the Workmen's Compensation Act persons employed otherwise than by manual labour, whose remuneration exceeded 250*l.* a year, a good many people who, before the war, would have been included in the Act, are now shut out by the rise of wages consequent on the increased cost of living. It is common knowledge that many classes of people have had their salaries raised owing to the cost of living. On this definition of a "workman" two questions arise; first of all, what is meant by a person employed otherwise than by way of manual labour? This Court in *Jaques v. Alexandra Towing Co.* (1), following and adopting the definition of the late Master of the Rolls in *In re Dairymen's Foremen and Tailors' Cutters* (2), took the view that the proper meaning of that term was that a person was employed otherwise than by way of manual labour whose employment was substantially otherwise than by way of manual labour, and the fact that he occasionally and incidentally did acts of manual labour did not prevent him from being a person employed otherwise than by way of manual labour, if the substantial part of his employment was not manual labour. Unfortunately, owing to the fact that the decision of the Court of Appeal was only given last term, the county court judge had not that test before him when he decided this case, and he appears to have thought that, if the man was employed to do any manual labour, it took him out of the class of people who were employed

(1) Unreported.

(2) 107 L. T. 342.

otherwise than by way of manual labour; but he uses, in summing up his result, this language: "This foreman is a man who goes and looks and, in the main, sees that the work is done, that is to say superintends or supervises, but from time to time is occasionally required to lend a hand." I see when the man himself was asked, "What is your work as a quay foreman?" his original answer was, "To overlook the labour and to direct the labour in loading and discharging ships." Taking that as the true view of the man's position, he comes exactly within the definition that has been adopted by this Court, for the substantial part of his work is not manual labour, and he is therefore, within the Act, a person employed otherwise than by way of manual labour. We are told that our decision in *Jaques v. Owners of the Tug Alexandra* (1) is on the way to the House of Lords, and, therefore, we have the satisfaction of knowing that an authoritative decision on that part of the definition in the Act will shortly be given.

The other point turns on the second part of the definition in the Act, "whose remuneration exceeds 250*l.* a year." Whereas Parliament gave elaborate definitions in the schedule of how to ascertain the earnings of a workman for the purpose of compensation, it entirely omitted to say how you are to find out whether a man's remuneration exceeded 250*l.* a year, so it has been suggested that a man's remuneration does not exceed 250*l.* a year unless within twelve months preceding the accident he has earned 250*l.* a year. It has been suggested on the other side that, if on the day of the accident the man is employed at a wage which, if continued for a year, would exceed 250*l.* a year, he is outside the Act, although his employment is seasonal and temporary and there is no reason to believe that it will continue for the year. In *Griffith v. Owners of S.S. Penrhyn Castle* (2), we had to consider the case of a man who was temporarily employed, but in my view both the members of the Court who gave judgments gave substantially the same definition of what is meant by a person "whose remuneration exceeds

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(2) [1917] 1 K. B. 474.

C. A. 1921 REID v. BRITISH AND IRISH STEAM PACKET CO. Scrutton L.J.	250 <i>l.</i> a year." I have read my own judgment in that case and I remain of the same opinion and do not think I can improve the matter by trying to repeat it in other words. I said (1): "In my view to satisfy the words of the Act it must be shown that there is a contract of employment which, unless determined by notice or by some extraneous fact such as death or the destruction of the subject matter of the contract, will last a year and produce a remuneration of over 250 <i>l.</i> "
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In this case the man was employed and paid monthly, his employment to be terminated by one month's notice. He had been with his employers for twenty years and his view, and their view, was that he was a very good servant, and would in ordinary circumstances continue with them for the rest of his life, if he was able to work. In those circumstances he seems to come exactly within my definition of a contract of employment which unless determined by notice, will last a year, and, for this reason also, I think he falls outside the Act. I quite appreciate that the effect of the rise in the cost of living and the consequent rise of salaries has been to exclude a number of people from the Act who would have been within it before the war, but that is a matter for Parliament to rectify by an alteration of the limit in the Workmen's Compensation Act, and not for this Court to endeavour to get round by any manipulation of the words which Parliament has used. For these reasons I agree that the appeal should be allowed.

YOUNGER L.J. I am of the same opinion, and I desire to add only one or two words upon the last question which has been discussed—namely, whether the applicant was a workman whose remuneration exceeded 250*l.* a year. He was in the employment of persons who had employed him for a period of over twenty years, and at the time of the accident he was receiving a remuneration which in fact produced more than 250*l.* in a year. It is said that he is not a person whose remuneration exceeds 250*l.* a year, because, under the terms of

(1) [1917] 1 K. B. 479.

his employment, that employment might be determined by a notice expiring before the end of the year. It seems to me that that is no answer to the contention that in the circumstances he was a person whose remuneration exceeded 250*l.* a year. It is true that a remuneration of say 5*l.* a week is not a remuneration which exceeds 250*l.* a year, within the meaning of the section, merely because if multiplied by fifty-two it will exceed that sum. But it appears to me that where there has been and is existing an employment, although under an agreement which may be determined by one month's notice, the workman who is receiving the sum which the applicant in this case was receiving, was receiving a remuneration exceeding 250*l.* a year so soon as it is ascertained, as it is in this case, that the employment in which he was engaged carried with it no necessary expectation of its being determined within the year. In my opinion, therefore, he is a workman whose remuneration did exceed 250*l.* a year within the meaning of the Act.

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Appeal allowed.

Solicitors : *Botterell & Roche ; H. Dade & Co.*

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[IN THE COURT OF APPEAL.]

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Feb. 7, 8. CURRIE *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Excess Profits Duty—Exception—Income Tax Repayment Agency—Payment by Commission—“Profession”—Question of Fact for Commissioners—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 38, sub-s. 1, s. 39.

The question whether a particular person carries on a “profession” within the exception (c) of s. 39 of the Finance (No. 2) Act, 1915, so as to exempt him from assessment to excess profits duty is one of fact to be determined by the Special Commissioners.

Where, therefore, the Commissioners have found as a fact that the person in question does or does not carry on a “profession” within the meaning of exception (c) of s. 39, and there is evidence on which they could reasonably so find and it is not shown that in so doing they have proceeded on a wrong principle, the Court has no jurisdiction to interfere with their finding.

Distinction between questions of law and questions of fact discussed.

Per Scrutton L.J. The fact that the person is a member of an organized professional body with a recognized standard of ability enforced before he can enter it and a recognized standard of conduct enforced while he is practising it is one that is material for the Commissioners to take into consideration in determining whether he is carrying on a profession, but is not in itself conclusive of the matter.

Decision of Rowlatt J. [1920] 1 K. B. 801 reversed.

APPEAL from a decision of Rowlatt J. (1) on a case stated under the Finance (No. 2) Act, 1915, s. 45, sub-s. 5, and the Taxes Management Act, 1880, s. 59, by the Commissioners for the Special Purposes of the Income Tax Acts.

At meetings of the Special Commissioners held on November 20, 1917, and May 31, 1918, for the purposes of hearing appeals, the appellant, Currie, who carried on business as “The Income Taxpayers’ Appeal Agency,” appealed against the assessment to excess profits duty in an “estimated” sum of 296*l.*—in the absence, at the time, of accounts—for the accounting period commencing on January 1, 1916, and ending on December 31, 1916, less 44*l.* deficiency in the prior accounting periods—namely, 252*l.* net duty charged, made upon him by the Commissioners of Inland Revenue under the provisions of Part III. of the Finance

(1) [1920] 1 K. B. 801.

(No. 2) Act, 1915, and subsequent enactments. There was no dispute as to figures, the sole ground of appeal being that the appellant claimed that he came within the exemption from excess profits duty accorded by s. 39, exception (c), of the Finance (No. 2) Act, 1915, in the case of "any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount."

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The following facts were proved or admitted.

The appellant had been carrying on the business of the Income Taxpayers' Appeal Agency, and doing the ordinary work of an accountant, for upwards of twenty years. He was not a chartered accountant, nor a member of any organized professional body. He had, however, from time to time employed a chartered accountant as a member of his staff, and a chartered accountant was in fact in his service during a substantial part of the accounting period under consideration and for a considerable period previously thereto. He specialised in income tax, assisting persons in the preparation of their income tax returns and claims for repayment of income tax, and advised taxpayers on general income tax and excess profits duty questions. He was paid by way of fixed fees for his accountancy work and for a portion of his income tax and excess profits duty work. For his services, however, in connection with income tax, &c., matters—and particularly as regards claims to relief from, or for repayment of, income tax—the appellant had frequently charged a percentage on the amounts discharged or recovered from the Revenue authorities by way of repayment, as the case might be. The percentage charges in the year 1914 amounted to something like one-fourth and in the year 1916 to two-thirds of the appellant's total receipts. Little or no capital was required in carrying on the appellant's business. The appellant had occasionally advertised.

It was contended on behalf of the appellant:—

(a) That the work carried on was a profession.

(b) That no capital was employed by the appellant, and

C. A. that the profits of his whole work were dependent on his
1921 personal qualifications.

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(c) That the assessment should be discharged. Alternatively it was contended that in any event that part of his earnings which arose from work paid for by fixed fees or from audits and pure accountancy work should be excluded from the pre-war and accounting period of profits respectively.

On behalf of the respondents, the Commissioners of Inland Revenue, it was contended (*inter alia*) :—

(a) That the appellant was carrying on a trade or business, and that the exception (c) to s. 39 of the Finance (No. 2) Act, 1915, did not apply to his case.

(b) That in any event the appellant was brought back into charge by the words in the last clause of the section.

(c) That the assessment should be increased to 611*l.* less 62*l.* balance of deficiency in prior accounting periods.

The Special Commissioners stated that having considered the whole of the facts and contentions as set out in the case, they were of opinion that the appellant came within the charge to excess profits duty, and they accordingly increased the assessment to the sum of 611*l.* less 62*l.* balance of deficiency in prior accounting periods—namely, 549*l.* net duty.

From this decision the appellant appealed.

Rowlatt J. held (1.) that the appellant was carrying on a profession within the exception (c) of s. 39 of the Finance (No. 2) Act, 1915; (2.) that his business was indivisible; and (3.) that looking at his business as a whole he was not a person “taking commissions in respect of any transactions or services rendered” within the third limb of s. 39, and that he was therefore not liable to excess profits duty.

The Commissioners of Inland Revenue appealed.

On March 26, 1920, the appeal came on to be heard, when after some argument the Court ordered that the case should be remitted to the Commissioners to state the following further facts :

“(1.) Whether the business carried on by the appellant was a profession.

“(2.) If they find it was a profession, whether they find it

was a business of any person taking commissions in respect of any transactions or services rendered or of any agent of any description."

In pursuance of this order the Commissioners by way of addition to the case stated further found as follows :

"We find that the business carried on by the appellant was not a profession."

The appeal came on for further hearing on February 7, 8, 1921.

Sir Ernest Pollock S.-G. and *R. P. Hills* for the appellants.

A. M. Latter for the respondent.

Having regard to the view taken by the Court of Appeal as to the effect of the further finding of the Commissioners it has not been thought necessary to report the arguments on the appeal, which were substantially the same as those used in the Court below.

LORD STERNDALÉ M.R. stated the facts as set out in the case stated by the Commissioners and continued : The question that had to be determined was whether, in those circumstances, the appellant was chargeable to excess profits duty under s. 39 of the Finance (No. 2) Act, 1915. He claimed that he was exempt on the ground that he was carrying on a "profession" within the meaning of that expression in the exception (c) to that section and that he did not come within the last clause of the exception, which brought into charge again, as it was said, the business of a person taking commissions in respect of any transactions or services rendered.

It is hardly necessary to repeat that the section is a very difficult one to construe. It uses vague expressions which have no defined limits of meaning, and certainly from the point of view of composition and grammar, it leaves a good deal to be desired. These two characteristics make the section very difficult indeed to deal with.

The first question that has been debated before us is this : Is the question whether a man is carrying on a profession or not a matter of law or a matter of fact ? I do not know

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that it is possible to give a positive answer to that question ; it must depend upon the circumstances with which the Court is dealing. There may be circumstances in which nobody could arrive at any other conclusion than that what the man was doing was carrying on a profession ; and therefore, looking at the matter from the point of view of a judge directing a jury, the judge would be bound to direct them that on the facts they could only find that he was carrying on a profession. That reduces it to a question of law. On the other hand, there may be facts on which the direction would have to be given the other way. But between those two extremes there is a very large tract of country in which the matter becomes a question of degree ; and where that is the case the question is undoubtedly, in my opinion, one of fact ; and if the Commissioners come to a conclusion of fact without having applied any wrong principle, then their decision is final upon the matter.

In this case Rowlatt J. took the view that the facts were so clear that the question was one of law. I cannot agree with that view, and I cannot reconcile it with the same learned judge's judgment in *Cecil v. Inland Revenue Commissioners*. (1) I cannot see that it was any more a question of law in the one case than in the other. As we were inclined to take that view, we thought, when the appeal first came before us, that it was better that the case should go back to the Commissioners in order to ascertain what they did in fact find, because on the case, as stated by them, they might have found him chargeable, either on the ground that he was not carrying on a profession or on the ground that, even though he were, he was brought into charge again by the last clause of the exception. We put both those two questions to them, and in their answer they stated that they found that he was not carrying on a profession, and they did not answer the second question, because in view of their answer to the first it became immaterial. But in sending the case back, we said distinctly that we did so without prejudice to the right of either party, whichever way the questions were answered, to contend that

(1) (1919) 36 Times L. R. 164.

there was no evidence at all to support the finding. What we really have now to deal with is whether there was any evidence to support the finding to which they came.

Now to a certain extent these matters are made rather more difficult because at the present day the Commissioners set out a good deal more of the evidence on the face of the case than they used to do. The reason for that, I think, was the one which I mentioned in *New Zealand Shipping Co. v. Thew* (1); and I think that the fact that they set out more of the evidence and the facts than they used to do has given rise to an idea that those are the only facts with which the Commissioners have had to deal, and that they are set out in order to enable the Court to come to a conclusion as to what is the right finding upon those facts. I expressed my opinion, in the case to which I have referred, that that idea was not correct, and I wish to repeat it. The Commissioners do not set out all the facts that they hear, but they do, for the reason I have mentioned, set out to some extent the facts upon which they come to their conclusion.

In this case this gentleman was carrying on the business of accountancy and at the same time of advising as to income tax claims, either for reduction or for repayment. He carried on also the business of communicating with the Inland Revenue authorities in order to get these deductions or allowances made. Speaking for myself, I have not the slightest doubt that the Special Commissioners are far better qualified to judge whether or not that is professional work than I am myself. They know far better what is the ordinary work done by an accountant or a person who specialises in income tax, like this gentleman, and it seems to me that the question is one of degree and one for them to decide. For that reason, I cannot see my way to interfere with their finding by saying that there is no evidence upon which they could find as they did.

I have been troubled very much by this: that I have an uncomfortable feeling, of which I have not yet got rid, that it is quite possible that a great deal more weight was attached

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by the Commissioners in coming to their conclusion to the fact that this gentleman was not a chartered accountant than I think should be attached to it. It is a matter to be considered, but I could not help feeling that it was possible that had he been doing exactly the same work and had been a chartered accountant, their finding might have been the other way. But although I have that doubt I am not, in my opinion, justified in saying, without any materials, that this was the view of the Commissioners. There were facts on which they could come to one conclusion or the other, and they came to the conclusion that the business carried on by this gentleman was not a profession. In my opinion we are bound by that finding, and therefore I think the appeal should be allowed, with costs here and below.

SCRUTTON L.J. This case raises again the extremely difficult questions with which the Court is confronted whenever it has to deal with s. 39 of the Finance (No. 2) Act, 1915.

Section 39, which begins by stating that Part III. of the Act applies to all trades or businesses of any description, excepts from trades and businesses any profession, but affords very little clue as to what exactly is meant by the very vague word "profession." In my view the first point which the Court has to consider is: What are its functions in a case where, on a special case, the meaning of the word "profession" comes before it? If the appellant is dissatisfied with the determination of the Commissioners as being erroneous in point of law, the special case is stated, and on it the High Court shall hear and determine any question or questions of law arising on the facts. If the questions arising in the case are questions of fact the determination of the Commissioners is final, provided that there was evidence on which they could come to the conclusion they did; and that the Court itself, or any member of the Court, might on the facts have come to a different conclusion is perfectly irrelevant, provided that there was evidence from which the Commissioners' conclusion could be reasonably drawn. I do not say that all the authorities on the subject have been consistent. I

rather agree with what Lord Parker said in *Farmer v. Cotton's Trustees* (1): "It may not always be easy to distinguish between questions of fact and questions of law for the purpose of the Taxes Management Act, 1880, or similar provisions in other Acts of Parliament. The views from time to time expressed in this House have been far from unanimous." I think the reason is, as has been suggested by the Master of the Rolls, that there has been a very strong tendency, arising from the infirmities of human nature, in a judge to say, if he agrees with the decision of the Commissioners, that the question is one of fact, and if he disagrees with them that it is one of law, in order that he may express his own opinion the opposite way. Undoubtedly the less a judge has tried cases with juries, the greater is the tendency on his part to think that the view he forms on the evidence is the only possible one; but when he has tried innumerable cases with juries and continually finds twelve reasonable and intelligent men taking a different view of the evidence from that which he himself takes, he becomes more and more convinced that there may be in many states of facts more than one possible view of the evidence, and that the fact that he would have taken a different view himself does not show that the view taken by the twelve persons was necessarily wrong.

Now I only wish to add this about the law. I had occasion when sitting as Revenue judge before I was raised to the Court of Appeal, to state what I conceived to be the law as to the powers of the Court on an appeal on a special case, in *Smith v. Incorporated Council of Law Reporting for England and Wales*. (2) The question in that case was whether a particular sum of money had been wholly and exclusively laid out or expended for the purposes of the respondents' business. I held that that was a question of fact, and I referred to a series of decisions in which that had been so laid down. The only reason why I mention that case now is that I had occasion in it to differ, with great respect, from a view expressed by Sir Samuel Evans, the late President of the Probate and Divorce Division, who had said in the Court

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(1) [1915] A. C. 922, 932.

(2) [1914] 3 K. B. 674, 682, 683.

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of Appeal in *Usher's Wiltshire Brewery v. Bruce* (1): "When the various circumstances and facts upon which the question depends are established and found, the proper inference to be drawn in order to determine whether the disbursements or expenses were wholly and exclusively laid out for the purposes of the trade or concern within the meaning of the provisions referred to is a question of law." I ventured respectfully to differ from that view, and referred to the cases which I thought justified me in so differing. I only mention it now because, when the case went to the House of Lords, the House of Lords took exactly the same view as I did and said that while the President had thought he was finding law he was really finding fact. Lord Sumner at the commencement of his judgment said (2): "The jurisdiction of the High Court, and on appeals from it, is by s. 59, sub-s. 2 (b), of the Taxes Management Act, 1880, to 'hear and determine the question or questions of law arising on a case transmitted under this Act.' This involves the construction of the language of the case stated. It must be interpreted in the light of common knowledge and by the common sense of the language used; but the findings of fact, as such, when ascertained are final." And later on he said: "I think that the judgment appealed against really finds facts"—that is what the President had said was law—"and does not, as it was supposed to do, rule the law, when it declares that the rents foregone are losses of annual value and not expenses of trade. . . ."

I think, therefore, in considering the question in this case that if there is any evidence on which the Commissioners could come to the conclusion that this gentleman did not carry on a profession, their decision is final, and that the fact that on that evidence I might have come to a different conclusion is absolutely immaterial, because I am not the judge of fact but only of law. They are the judges of fact, and whether a man carried on a profession is in the last resort a question of fact. The reason why it appears to me to be so is this. In my view it is impossible to lay down any strict

(1) [1914] 2 K. B. 891, 901.

(2) [1915] A. C. 433, 465, 467.

legal definition of what is a profession, because persons carry on such infinite varieties of trades and businesses that it is a question of degree in nearly every case whether the form of business that a particular person carries on is, or is not, a profession. Accountancy is of every degree of skill or simplicity. I should certainly not assent to the proposition that as a matter of law every accountant carries on a profession or that every accountant does not. The fact that a person may have some knowledge of law does not, in my view, determine whether or not the particular business carried on by him is a profession. Take the case that I put during the argument, of a forwarding agent. From the nature of his business he has to know something about railway Acts, about the classes of risk that are run in sending goods in a particular way, and under particular forms of contract. That may or may not be sufficient to make his business a profession. Other persons may require rather more knowledge of law, and it must be a question of degree in each case. Take the case before Rowlatt J. of a photographer: *Cecil v. Inland Revenue Commissioners*. (1) Art is a matter of degree, and to determine whether an artist is a professional man again depends, in my view, on the degree of artistic work that he is doing. All these cases which involve questions of degree seem to me to be eminently questions of fact, which the Legislature has thought fit to entrust to the Commissioners, who have, at any rate, from their very varied experience, at least as much knowledge, if not considerably more, of the various modes of carrying on trade than any judge on the bench.

I was very much struck with, and I agree with, the way in which Rowlatt J. put it in the last paragraph of his judgment in the Stock Exchange case: *Christopher Barker & Sons v. Inland Revenue Commissioners* (2): "I very much doubt whether it would be possible for me even if I held a different view to decide otherwise. After all the Commissioners are judges of fact, and they have not disclosed to me what view of the law they took. All that appears on the case is that they decided that the exception did not apply; that the appellants

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(1) 36 Times L. R. 164.

(2) [1919] 2 K. B. 222, 230.

C. A. did not carry on a profession and were therefore liable to
1921 excess profits. I cannot possibly say there is no evidence
CURRIE in support of that finding. But as the Commissioners have
v. not disclosed to me upon what view of the law they proceeded,
INLAND I very much doubt whether they have stated a case upon
REVENUE any point which is open to me." I was also struck with
COMMIS- the passage in the judgment of Lord Halsbury in *American*
SIONERS. *Thread Co. v. Joyce* (1), in which he said: "The truth is,
Scrutton L.J. one is betrayed into discussing a question of fact without
remembering that we have no jurisdiction over the question
of fact. The question only by a side wind has been brought
into a question of appeal upon points of law, namely, whether
there was any evidence to justify what the Commissioners
found. My Lords, to my mind it is absolutely unarguable.
The facts set out by the Commissioners are found by them
under circumstances when we have no authority to review
the finding if it was wrong."

The position therefore being that as to facts, if there is
any evidence to support the finding of the Commissioners, we
have no authority to interfere with it, it appears to me that
in this case it is a question of degree as to which the ultimate
finding is a matter for the Commissioners, and I am unable
to say that they acted on a wrong principle, and indeed if I
were invited to define exhaustively as a matter of law what
a profession was, I should find the utmost difficulty in doing so.

There is only one other matter I desire to mention. I
quite feel the difficulty that has pressed the Master of the
Rolls, if it is a fact that the Commissioners have found that
chartered accountants are professional men and have found
that this gentleman is not a professional man because he is
not a member of that body. At the same time I am not at
all clear that the fact that there may be two inconsistent
findings of fact by the tribunal which is bound to decide facts
would in itself justify this Court in interfering. That may
be the mistake of the Legislature in entrusting the decision
to such a body as the Commissioners or it may be due to the
infirmity of human nature in sometimes making mistakes.

But I do desire to say this, as the Master of the Rolls has mentioned it, that I myself am disposed to attach some importance in findings as to whether a profession is exercised or not to the fact that the particular man is a member of an organized professional body with a recognized standard of ability enforced before he can enter it and a recognized standard of conduct enforced while he is practising it. I do not for a moment say it settles the matter, but if I were deciding a question of profession I should attach some importance to that particular feature. But, as I have said, the question is one of fact for the Commissioners and I cannot see that there is anything wrong in law in the view they have taken, and for these reasons I agree with the judgment which has just been pronounced by my Lord.

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YOUNGER L.J. I am of the same opinion.

Appeal allowed.

Solicitor for appellants: *Solicitor of Inland Revenue.*

Solicitors for respondent: *Savory, Pryor & Blagden.*

W. I. C.

Principle applied. MUNDAY v.
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March 7.

FORD v. RECEIVER FOR THE METROPOLITAN POLICE DISTRICT.

[1919. F. 903.]

Criminal Law—Riot—Intent to render mutual Help against Opposition—Force and Violence causing Alarm—Persons riotously and tumultuously assembled—House injured—Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), s. 2, sub-s. 1; 3 sub-s. 1; 4 sub-s. 1.

During the public rejoicings on Peace night, 1919, a crowd of people assembled together and did damage to an empty house by taking the woodwork and floorboards as fuel for a bonfire. Some were armed with crowbars and pickaxes, but the crowd was in very good humour, and no evidence was given of any threat or violence offered by them to any person. A next-door neighbour gave evidence that he begged the crowd not to break into his premises, but Bailhache J. said he did not think they had any such intention. The witness also said that he made no attempt to prevent the crowd from damaging the empty house, because he was afraid that if he did he would be injured. A claim for compensation being made by the owner of the house under the Riot (Damages) Act, 1886:—

Held, that there was evidence (1.) of an intent by the crowd to help one another, by force if necessary, against any person who might oppose them in their common purpose, and (2.) of force and violence, not merely used in and about the common purpose, but displayed in such a manner as to alarm a person of reasonable firmness and courage—namely, the above-mentioned neighbour; that these two elements were, in fact, established; and that, the other three elements declared by the Divisional Court in *Field v. Receiver of Metropolitan Police* [1907] 2 K. B. 853 necessary to constitute a riot being also established—namely, the assemblage of at least three people, a common purpose, and the execution of the common purpose—the above facts constituted a riot.

ACTION before Bailhache J. without a jury.

The plaintiff, Solomon Ford, was the owner of a house, No. 2, Ford's Park Road, Canning Town, and the action was brought against the defendant under the provisions of s. 1 of the Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), which provides by sub-s. 1: "Where a house . . . in any police district has been injured or destroyed . . . by any persons riotously and tumultuously assembled together . . . compensation . . . shall be paid out of the police rate of such district to any person who has sustained loss by such injury . . .

or destruction. . . .” The defendant was the police authority for the Metropolitan Police District.

On June 28, 1919, on the occasion of the Peace celebrations, a crowd of about one hundred and fifty or two hundred people was assembled in the above road, and some of them were carrying crowbars and pickaxes. They had lighted a bonfire, and in order to obtain fuel to feed it they had entered the plaintiff's house—which was then and had been for some years empty, and was in a bad state of repair—and had taken from it everything of an inflammable nature they could find, such as woodwork and floor boards, and had done considerable injury to the premises. Bailhache J. in his judgment said: “These people went to this house with a common purpose in very good humour,” but added: “I think there is no doubt that anybody who had interfered with them would have been subjected to rough usage.” Evidence was given by a Mr. Whowell, living next door to the house in question, that he was afraid that the crowd would break into his premises and that he begged them not to do so, and that they had not done so, and Bailhache J. found that they had never intended to do so. The witness said that he had not interfered with the crowd injuring the plaintiff's house as he was afraid of being killed had he done so. He said the people seemed very happy. No evidence was given of any threat or violence offered by the crowd to any individual, and witnesses were called for the defence who said that they were present but were not frightened. There was evidence that children had been in the habit of going into the house and bringing out pieces of wood.

On a claim being made on the police authority for compensation the defendant's solicitors wrote on August 15, 1919: “If you will refer to the Riot (Damages) Act, 1886, you will find that the Receiver is put in a judicial position, and that he can only be sued after he has had placed before him the evidence necessary to enable him to form an opinion as to whether the claim comes within the provisions of the Act or not and is a right and proper one We suggest you should in the first instance send us proofs of the evidence of

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the witnesses you propose to call in support of your claim. . . .”
 The plaintiff refused to supply the proofs, and the defendant still maintaining his right to them, and failing to fix compensation, this action was brought under the provisions of s. 4, sub-s. 1, of the Act.

Barrington-Ward K.C. and *du Parcq* for the defendant.
 There is a preliminary objection. The defendant has not received the information from the plaintiff to which he is entitled under the Regulations dated June 30, 1894 [1894, No. 636], made by the Secretary of State under s. 3, sub-s. 2, of the Riot (Damages) Act, 1886. By r. 8, “In all cases the claim shall state generally the evidence which the claimant is prepared to offer in support of it”; and by r. 9: “The claimant, if so required by the police authority, shall verify the claim by himself making such a statutory declaration, and by procuring and furnishing to the police authority such statutory declarations of other persons as the police authority may require.” The intention of the Act is that the Receiver, as police authority, shall be a court of first instance, and he is entitled to have put before him sufficient evidence to enable him to determine judicially whether there is a proper claim for compensation. No doubt he was not entitled to see the proofs; but the fact that he asked for too much does not excuse the plaintiff for not sending the proper evidence. The plaintiff never offered a statutory declaration. As the making of a claim and the being aggrieved by a failure to fix compensation is by s. 4, sub-s. 1, a condition precedent to the right to bring an action, and as the failure was due to the plaintiff’s default, this preliminary objection ought to prevail.

van den Berg for the plaintiff. When the plaintiff has made a claim in proper form then by s. 3, sub-s. 1, the police authority is bound to investigate it, and nothing in the Act forces the plaintiff to produce his proofs of witnesses. By refusing to act without them the defendant has in effect refused to investigate the claim. He did not ask for a statutory declaration to which he was entitled. He is not, as contended, in a

judicial position ; he is the very person against whom the action must be brought, and that action is not an appeal from his decision, but a substantive action. [The preliminary objection was overruled.]

Barrington-Ward K.C. and *du Parc* for the defendant. There is no evidence that there was a riot, which it is necessary for the plaintiff to establish. In *Field v. Receiver of Metropolitan Police* (1) the Divisional Court (Phillimore and Bray JJ.) held that in order to establish a riot five elements are necessary : (i.) a number of persons not less than three ; (ii.) a common purpose ; (iii.) execution or inception of the common purpose ; (iv.) an intent on the part of the number of persons to help one another, by force if necessary, against any person who may oppose them in the execution of the common purpose ; and (v.) force or violence, not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage. As to (iv.) there is no evidence that anybody attempted to oppose the crowd, and therefore no evidence of their intention to resist opposition to their common purpose, nor is there any evidence, as there should be, that the crowd was angry. As to (v.) there was no evidence that what was done was in *terrorem populi*. The evidence is that the crowd was in the best of tempers at a time of national rejoicing. The "force or violence" which causes alarm does not mean the force and violence used in carrying out the purpose, but a force and violence which alarms at least one person not interested in the purpose. The alarm must be felt not by a person interfering, but by a person who is present merely. The object of the crowd must be considered, and that was only to obtain fuel, and, no doubt, destroy property, in order to feed a bonfire lit as a means of displaying their joy.

van den Berg for the plaintiff. All the elements held to be necessary in *Field's Case* (1) were present. The first three were clearly present. As to (iv.) the evidence was that Mr. Whowell was afraid the crowd would attack his house, and thought that if he interfered he would be injured. It

(1) [1907] 2 K. B. 853, 860.

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cannot be necessary to show that some person did interfere, for it would require a person of more than ordinary firmness and courage to do that, and such evidence would not often be available. The question in determining whether the force and violence were calculated to cause alarm is how they were displayed, and there was the evidence of Mr. Whowell that its display did cause him alarm. "Displayed" is the important word in (v.). It is to be noted that even in *Field's Case* (1), which was really only a case of a rough game by boys and youths, the Court considered very seriously whether or not the facts constituted a riot.

BAILHACHE J. This is an action brought in respect of damage done to a house, No. 2, Ford's Park Road, Canning Town, and it is alleged that it was done in consequence of a riot and by rioters on the night of June 28, 1919. The action is brought under the Riot (Damages) Act, 1886. That Act provides by s. 2, sub-s. 1, that compensation is to be paid out of the police rate where a house or building in a police district has been injured by persons riotously and tumultuously assembled together. By s. 3, sub-s. 1, the police authority is to investigate the matter in the first place, and by the Regulations a claim is to be made within fourteen days, and certain particulars given, and by reg. 9 if the police authority so requires, the claimant is to make certain statutory declarations. A preliminary point was taken that the police authority, the defendant, had not received the information to which he was entitled, and as it is a necessary preliminary to the right to bring the action that the defendant should investigate the claim, that the preliminary objection ought to succeed.

I have come to the conclusion that the preliminary objection fails. This depends on the statute and the regulations, and I need not read them again. Generally speaking, the declarations which may be called for relate to the nature and amount of the damage done and compensation required. The defendant in

(1) [1907] 2 K. B. 853, 860.

this case required the proofs of the evidence of the plaintiff's witnesses. These proofs he was not entitled to receive. He may have been entitled to statutory declarations but he did not ask for them. To ask for information to which he was not entitled and to refuse to act unless it was supplied was, in effect, a refusal by the defendant to make the inquiry. I think the intention of the Act was that as to the fact of riot the police authority is to make his own inquiries with such assistance from the claimant as he is entitled to ask for. He is in a better position to get information on this matter than a claimant would be.

The next point raised was that there was no evidence of a riot. It appears that some one hundred and fifty or two hundred persons, some armed with crowbars and pickaxes, went to the house in question, which was empty and had been empty for some years, and took from it all the inflammable material they could lay their hands on. It was Peace night and they wanted to make a bonfire. Now, no doubt, that constituted a malicious injuring of the plaintiff's property and there was a common purpose to do an unlawful act. But it is said that that is not sufficient to constitute a riot, and the case of *Field v. Receiver of Metropolitan Police* (1) was referred to. The circumstances in that case were different from those in the present case, but the Divisional Court in a very careful judgment, after an examination of all the authorities, laid down the following five elements as constituting a riot. First, that there should be not less than three persons concerned. That, of course, is satisfied here. Secondly, that there should be a common purpose. I think that is satisfied. Thirdly, execution of the common purpose. That is also satisfied. Fourthly, an intent on the part of the above persons to help one another, by force if necessary, against any person who may oppose them in the execution of the common purpose. I think again that that is satisfied. These people went there with crowbars and pickaxes, and I think there is no doubt that anybody who had interfered with them would have been subjected to rough usage. Fifthly, there must be force or violence, not

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(1) [1907] 2 K. B. 853, 860.

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merely used in and about the common purpose, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage. The determination of this point has given me some trouble, and it is round this one of the elements necessary to constitute a riot that the discussion has most largely turned. The evidence is that of Mr. Whowell, who said that he saw the people coming and that he was afraid they would break into his premises, and that he went out and begged them not to do so. They did not do so, and I do not think they were ever minded to do so. Mr. Whowell said he did not like to interfere with these people injuring the plaintiff's house, because he thought he would have been killed if he had. This is probably an exaggeration, but at any rate, he was afraid. The question, to my mind, is whether that evidence is sufficient to establish the fifth element above mentioned. I have no reason to doubt that Mr. Whowell is a man of reasonable firmness and courage, and it seems to me that his evidence is sufficient. I do not think the fourth and fifth elements can be said to be absent because the people assembled go about the business in hand quietly if not interfered with. If that were so any number of persons might at any time assemble with the unlawful intent of demolishing another's house, and if nobody interfered with them it would be said that as they never threatened anybody what they did did not constitute a riot. That seems to me an impossible view to take, and it might be true of any riot that ever took place. For instance, take the historical case of the mob pulling down the railings round Hyde Park. I daresay that if nobody had interfered with them no violence to anybody would have resulted, and it would have been said that there was no riot.

I think that in the present case it is enough to say that these people went to this house with a common purpose in good humour, but armed with crowbars and pickaxes. They did not interfere with anybody because nobody interfered with them, but the man living next door said that although they did not interfere with him he did not dare to interpose, because he believed he would have been injured had he done so. It seems to me that there were all the elements of a riot present

in this case. There must be judgment for the plaintiff, and the question of the quantum of damages must be referred.

Judgment for plaintiff.

Solicitors for the plaintiff: *Greenwood & Greenwood.*

Solicitors for the defendant: *Ellis & Ellis.*

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[1920. J. 3120.]

Gaming—Partnership for carrying on betting Business—Whether possible in Law.

A partnership for the purpose of carrying on a betting and book-maker's business is not per se illegal or impossible in law.

Dictum of Fletcher Moulton L.J. in *Hyams v. Stuart King* [1908]
2 K. B. 696, 718, and opinion of Darling J. in *O'Connor v. Ralston* [1920]
3 K. B. 451 not followed.

ACTION tried by McCardie J.

The plaintiffs, a firm of bookmakers, sued the defendant to recover 97*l.* 17*s.* 4*d.*, the amount of six cheques paid by them to her in respect of bets won by her from them on horse races. The defendant cashed the cheques with divers persons who became, as the judge held, holders for value. Those persons duly presented the cheques for payment and they were paid by the plaintiffs' bankers. As the defendant in other transactions with the plaintiffs had lost, but had not paid, certain bets, the plaintiffs brought this action to recover, under s. 2 of the Gaming Act, 1835, the amount of the cheques they had paid to her.

The defence set up was that a partnership for the purpose of carrying on a betting business was illegal or was impossible in law, and therefore that the plaintiffs were not entitled to maintain the action.

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Cannot for the plaintiffs. Betting is not illegal, and a betting business may lawfully be carried on by an individual or by a partnership. In *Thwaites v. Coulthwaite* (1) Chitty J. held that an account could be ordered between partners in a betting business: see also *Harvey v. Hart* (2) and the observations of Collins L.J. in *Saffery v. Mayer*. (3) It is true that in *Thomas v. Dey* (4) Darling J. expressed a different opinion, but *Thwaites v. Coulthwaite* (1) was not there cited, and his view was dissented from by Avory J. in *Brookman v. Mather*. (5)

[MCCARDIE J. What do you say as to the dictum of Fletcher Moulton L.J. in *Hyams v. Stuart King* (6) that a partnership for the purpose of carrying on a betting business is not possible under English law—an opinion followed and acted upon by Darling J. in *O'Connor v. Ralston* (7) ?]

Fletcher Moulton L.J. was the dissentient member of the Court in *Hyams v. Stuart King* (6), and the actual decision is inconsistent with his dictum. Moreover, the dictum is directly contrary to the earlier cases such as *Thwaites v. Coulthwaite*. (1) In *O'Connor v. Ralston* (7) Darling J. followed, not the judgment in *Hyams v. Stuart King* (6), but the dictum of the dissentient member of the Court.

Bensley Wells for the defendant. Since the passing of the Gaming Act, 1892, a partnership in a betting business is not possible under English law: per Fletcher Moulton L.J. in *Hyams v. Stuart King*. (6)

[MCCARDIE J. That involves that *Thwaites v. Coulthwaite* (1) was wrongly decided.]

In that case the Gaming Act, 1892, was not considered.

[MCCARDIE J. In *Partridge v. Mallandaine* (8) partners in a betting business were held to exercise a "vocation" within the Income Tax Act, 1842, and were chargeable to income tax on the profits of the business.]

That again was before the Act of 1892, which destroyed the possibility of such a partnership. As was said by Fletcher

(1) [1896] 1 Ch. 496.

(2) [1894] W. N. 72.

(3) [1901] 1 K. B. 11, 17.

(4) (1908) 24 Times L. R. 272.

(5) (1913) 29 Times L. R. 276.

(6) [1908] 2 K. B. 696, 718.

(7) [1920] 3 K. B. 451.

(8) (1886) 18 Q. B. D. 276.

Moulton L.J. in *Hyams v. Stuart King* (1): "It is essential to the idea of a partnership that each partner is an agent of the partnership and (subject to the provisions of the partnership deed) has authority to make payments on its behalf for partnership purposes, for which he is entitled to claim credit in the partnership accounts and thus to receive, directly or indirectly, repayment. But by the Gaming Act, 1892, all promises to pay any person any sum of money paid by him in respect of a wagering contract are null and void. These words are wide enough to nullify the fundamental contract which must be the basis of a partnership, and therefore in my opinion no such partnership is possible." That is the correct view of the law; it was adopted and applied by Darling J. in *O'Connor v. Ralston* (2); and it should be followed in this case.

Cannot in reply. Although the Gaming Act, 1892, has affected in one respect the position of co-partners in a betting business, it has not nullified the fundamental contract which is the basis of a partnership.

[*De Mattos v. Benjamin* (3) was also referred to.]

Cur. adv. vult.

March 16. McCARDIE J. read the following judgment. The plaintiffs are professional betters and bookmakers. They bring this action as a partnership firm against Miss Bamford to recover 97*l.* 17*s.* 4*d.*, the total of six cheques paid by the plaintiffs to the defendant for bets won by her from the plaintiffs in respect of horse races. The defendant cashed the cheques with divers persons who became holders for value. Those persons duly presented the cheques for payment. They were paid by the plaintiffs' bankers. Hence the plaintiffs bring this action under s. 2 of the Gaming Act, 1835. They rely, so far as necessary, on the well-known decision of the Court of Appeal in *Dey v. Mayo*. (4) It is only just to the plaintiffs to say that they would not have commenced these proceedings but for the fact that the defendant, whilst receiving

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(1) [1908] 2 K. B. 696, 718.

(2) [1920] 3 K. B. 451.

(3) (1894) 63 L. J. (Q. B.) 248.

(4) [1920] 2 K. B. 346.

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and keeping her winnings from the plaintiffs, declined to pay her losses. Hence this action.

It is conceded by the defendant's counsel that unless the point to be dealt with in this judgment be ruled in his favour the plaintiffs are entitled to recover. That point rests on the fact that the plaintiffs sue as partners. The defendant contends that a firm of professional bookmakers are unable to maintain such an action as the present. It is argued that a partnership for the purpose of carrying on a betting business is either illegal or is impossible in law, and that I must therefore dismiss the present action.

The wide consequences of a ruling against the plaintiffs are obvious. I need not detail them. The principle involved is important. The defendant's contention rests (1.) on the dictum of Fletcher Moulton L.J. in his dissenting judgment in *Hyams v. Stuart King* (1) and (2.) on the view expressed by Darling J. in *O'Connor v. Ralston* (2), which followed and applied the dictum of Fletcher Moulton L.J. Mr. Cannot for the plaintiffs challenged those opinions. He strongly submitted that they were contrary to a large body of authority, and that there is nothing in law to prevent the maintenance of this action. I am therefore reluctantly compelled to consider the effect of the relevant decisions on the point.

The dictum of Fletcher Moulton L.J. in *Hyams v. Stuart King* (1) is clear in its wording. In that case he said: "The so-called firm was an association for the purpose of carrying on a betting business and nothing else. . . . In my opinion no such partnership is possible under English law. Without considering any other grounds of objection to its existence, the language of the Gaming Act, 1892, appears to me to be sufficient to establish this proposition. It is essential to the idea of a partnership that each partner is an agent of the partnership and (subject to the provisions of the partnership deed) has authority to make payments on its behalf for partnership purposes, for which he is entitled to claim credit in the partnership accounts and thus to receive, directly or indirectly, repayment. But by the Gaming Act, 1892, all promises to

(1) [1908] 2 K. B. 696, 718.

(2) [1920] 3 K. B. 451.

pay any person any sum of money paid by him in respect of a wagering contract are null and void. These words are wide enough to nullify the fundamental contract which must be the basis of a partnership, and therefore in my opinion no such partnership is possible, and the action for this reason alone was wrongly framed and should have been dismissed with costs." If this dictum, fortified by the opinion of Darling J. in *O'Connor v. Ralston* (1), be the existing law then the action before me should apparently fail in its present form.

In order to test the matter and to appreciate also the vigorous argument of Mr. Cannot it is necessary to remember several points. In the first place if a partnership be clearly illegal the Courts will not recognize it or enforce any rights which the supposed partners would otherwise have: see the authorities well collected in Halsbury's Laws of England, vol. xxii., p. 17. Thus a partnership for the sale of smuggled goods would not be allowed to invoke the aid of the Courts: see *Biggs v. Lawrence*. (2) So, too, the Court has naturally refused to entertain a suit instituted by one highwayman against another for an account of their plunder: see *Everet v. Williams*. (3) If a partnership be illegal its members cannot maintain any action in respect of a transaction tainted with the illegality: Lindley on Partnership, 8th ed., p. 127. As it was put by Jessel M.R. in *Sykes v. Beadon* (4): "It is no part of the duty of a Court of justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract, between the parties to that illegal contract." But a partnership although illegal—e.g., as contrary to s. 4 of the Companies Act, 1862—can prosecute a person for stealing its property: *Reg. v. Tankard* (5); and see *Reg. v. Frankland* (6); and Lindley on Partnership, 8th ed., p. 127. Compare, however, *Reg. v. Hunt*. (7) Many authorities on illegal partnerships are collected in Lindley, 8th ed., pp. 110 et seq. I conceive that if a partnership were formed for

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(1) [1920] 3 K. B. 451.

(2) (1789) 3 T. R. 454.

(3) (1787) Cited in Lindley on Partnership, 8th ed., p. 113.

(4) (1879) 11 Ch. D. 170, 196.

(5) [1894] 1 Q. B. 548.

(6) (1863) L. & C. 276.

(7) (1833) 8 C. & P. 642.

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the purpose of violating the Betting Act, 1853, it would be an illegal association in the fullest sense and the partners would be debarred from seeking the aid of the Court in enforcing any contract tainted with the illegality.

In the second place, betting or wagering is not illegal at common law, unless indeed of an immoral tendency or otherwise contrary to the policy of the law. In former days the Courts were often called upon to adjudicate upon frivolous wagers. They did not refuse jurisdiction, but if other and more important actions were awaiting trial the judges postponed the wagering disputes. As Bayley J. said in *Gilbert v. Sykes* (1): "I think it would be a good rule to postpone the trial of every action upon idle wagers till the Court had nothing else to attend to." A good instance of the class of action dealt with by the Courts was *Hussey v. Crickitt* (2), the "rump and dozen" case. It was held by Mansfield C.J. and Heath and Chambre JJ. that an action may be maintained upon a wager of a "rump and dozen" whether the defendant be older than the plaintiff. It was further held that when a dinner is ordered at a tavern by the authority of two persons who have laid a wager of "rump and dozen," if the winner pays the bill he may maintain an action against the loser for money paid. The cases are collected in Stutfield on Betting, 3rd ed., pp. 1 et seq.

It has been repeatedly pointed out that mere betting on horse races is not illegal. Thus Fletcher Moulton L.J. himself said in *Hyams v. Stuart King* (3): "By common law wagers were not illegal, and the nature of a wager is such that from the point of view of jurisprudence there is ample consideration for a valid contract. The distinction which English law makes between wagering contracts and others is therefore entirely the creation of statute." See too per Hawkins J. in *Read v. Anderson* (4) when, after citing the Act of 1845, s. 18, he said: "There is nothing in this language to affect the legality of wagering contracts, they are simply rendered null and void; and not enforceable by any process of law.

(1) (1812) 16 East, 150, 162.

(2) (1811) 3 Camp. 168.

(3) [1908] 2 K. B. 696, 712.

(4) (1882) 10 Q. B. D. 100, 105.

A host of authorities have settled this to be the true effect of the statute." This view was affirmed by the Court of Appeal. (1) The actual decision in that case is of course now nullified by the Gaming Act, 1892.

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In *Partridge v. Mallandaine* (2) it was held by Denman and Hawkins JJ. that persons who, in partnership, attended races and systematically betted, carried on a "vocation" under the Income Tax Act, 1842, and were liable to be assessed on their profits. In that case Hawkins J. said: "Mere betting is not illegal. It is perfectly lawful for a man to bet if he likes. He may, however, have a difficulty in getting the amount of the bets from dishonest persons who make bets and will not pay. The appellants, in fact, make considerable profits, and I cannot see why they should not be taxed as those made in any other profession or calling." That case is still good law, and it would seem strange if partners in a betting business could be assessed as a firm and yet be disabled as a firm from suing or being sued in the Courts. Now, the Gaming Act, 1892, provided that a promise to repay a person a sum of money paid by him in respect of any contract or agreement rendered void by the Gaming Act, 1845, should itself be void. Before that Act it had been held by the Court of Appeal that if a person employed a commission agent to make bets on horse races for him, and the bets were won and the agent received the winnings, an action for money had and received would lie against the agent for the amount of those winnings: see *Bridger v. Savage*. (3) In that case Bowen L.J. said (4): "Now with respect to the principle involved in this case, it is to be observed that the original contract of betting is not an illegal one, but only one which is void. If the person who has betted pays his bet, he does nothing wrong; he only waives a benefit which the statute has given to him, and confers a good title to the money on the person to whom he pays it." It was at one time suggested that the decision in *Bridger v. Savage* (1) had been neutralized by the Gaming Act, 1892. But the contrary has been held by Lord Coleridge C.J.

(1) (1884) 13 Q. B. D. 779.

(3) (1885) 15 Q. B. D. 363.

(2) 18 Q. B. D. 276, 278.

(4) Ibid. 367.

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and Day J. in *De Mattos v. Benjamin*. (1) They held that the Act of 1892 does not prevent a principal from recovering from his agent through whom he has made bets money paid to the agent by a third person in respect of the bets. *Bridger v. Savage* (2) is still good law.

In the third place, therefore, it must be remembered that no encroachment can be made on the legality or validity of betting or betting transactions save by the express effect of statutory enactment. The common law remains save as altered by Act of Parliament. The Gaming Act, 1892, I may point out, created no offence. It only rendered void in substance promises of reimbursement to an agent in respect of betting debts paid.

In the case now before me there is no suggestion that the plaintiffs intended to violate or in fact violated any statutory provision. It is well said in *Lindley on Partnership*, 8th ed., p. 110: "Illegality is never presumed, but must always be proved by those who assert its existence; and in order to show that a partnership is illegal it is necessary to establish either that the object of the partnership is one the attainment of which is contrary to law, or that the object being legal, its attainment is sought in a manner which the law forbids." There is nothing in the facts before me which on the ground of illegality disables the present partnership from maintaining this action. The defence of Miss Bamford must therefore rest on the contention that a partnership for a betting business is impossible in law. This seems to have been the view of Fletcher Moulton L.J. in *Hyams v. Stuart King*. (3) This view, I feel, rests substantially on the hypothesis that community or participation in loss is essential to the legal notion of partnership. Is this hypothesis well founded? Upon the whole I think not. The point is not dealt with in the Partnership Act, 1890. That Act deals (see s. 2) with the effect of sharing in profits as evidence of a partnership status. It has no analogous provision as to the sharing in losses. Upon the authorities I form the view that a man may be a partner

(1) 63 L. J. (Q. B.) 248.

(2) (1885) 15 Q. B. D. 363.

(3) [1908] 2 K. B. 696, 718.

even though he is free from responsibility (as between his co-partner and himself) for losses incurred. In *Coope v. Eyre* (1) Lord Loughborough is reported to have said: "In order to constitute a partnership a communion of profits and loss is essential." But this suggestion seems contrary to binding authority. Thus in *Bond v. Pittard* (2) A. and B. were partners, but by the partnership agreement B., though he was to receive annually out of the profits the sum of 300*l.*, was not to be in any way liable to the losses of the business. It was held by Lord Abinger C.B. and Parke, Bolland and Gurney BB. that a legal partnership existed, and that A. and B. rightly sued as co-partner plaintiffs in an action for work and labour. This ruling was consonant to the opinion of the House of Lords in *Geddes v. Wallace*. (3) As it is put in Lindley on Partnership, 8th ed., p. 50: "But there is nothing to prevent one or more partners from agreeing to indemnify the others against loss, or to prevent full effect from being given to a contract of partnership containing such a clause of indemnity": see also p. 444 of the same work. These authorities, if I may most respectfully say so, seem to negative in principle the underlying assumption in the already cited dictum of Fletcher Moulton L.J.

The following is a relevant passage from Lindley on Partnership, 8th ed., p. 116, upon the point now before me: "The Gaming Acts have not made betting in itself illegal, and a bookmaking and betting business can be carried on without contravening those Acts; a partnership therefore between bookmakers is not necessarily illegal, nor does it become so merely because one partner has been guilty of illegal acts in conducting the partnership business." At p. 134 the author makes substantially the same statement, and adds: "The Court, therefore, will direct an account between partners in such a business, though perhaps not of any particular transactions carried out in an illegal manner." See also p. 443 of the same work. To each of those passages there is given (*inter alia judicia*) a reference to *Hyams v. Stuart King* (4),

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(1) (1788) 1 H. Bl. 37, 49.

(2) (1838) 3 M. & W. 357.

(3) (1820) 2 Bli. 270.

(4) [1908] 2 K. B. 696, 718.

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which shows that the dictum of Fletcher Moulton L.J. has been considered. Now, if the opinion of Lord Lindley be correct, it must follow, I think, that the present action can be maintained. For it can scarcely be said that although an action for a partnership account can be brought by one partner in a betting business against his co-partner, yet that such an action as the one now before me is to be dismissed.

How then do the decisions stand on the matter? The leading case is *Thwaites v. Coulthwaite* (1) decided by Chitty J. It was an action for a partnership account. The plaintiff and defendant were partners in a bookmaking and betting business. The defendant contended that having regard to the nature of the business no such relief as that asked could be obtained, but it was held by Chitty J. that as a bookmaking and betting business could be carried on without contravening the Betting Act, 1853, the plaintiff was entitled to the account claimed. The learned judge emphatically pointed out that betting per se was not illegal. *Thwaites v. Coulthwaite* (1) was decided four years after the Gaming Act, 1892, was passed. That Act, however, was not referred to at the trial. It may be said that this point weakens the decision, and apparently Fletcher Moulton L.J. in *Hyams v. Stuart King* (2) impliedly disapproved of the decision of Chitty J. But it must be pointed out that Fletcher Moulton L.J. was the dissenting Lord Justice in *Hyams v. Stuart King* (2), and the majority of the Court of Appeal in that action actually treated the betting partnership in question as one valid in law, and to be recognized by the Courts. Judgment was given against them as a firm. Sir Gorell Barnes, who presided, declined to legislate where Parliament has not thought fit to intervene. Farwell L.J. expressly said (3): "I am not prepared to overrule the decision of Chitty J. in *Thwaites v. Coulthwaite*." (1)

It must be remembered that the dictum of Fletcher Moulton L.J. in *Hyams v. Stuart King* (2) only became relevant in that action, because the defendants (who were a betting firm) were sued as partners under Order XLVIII.A, r. 1. That

(1) [1896] 1 Ch. 496.

(2) [1908] 2 K. B. 696, 718.

(3) [1908] 2 K. B. 696, 725.

rule provides that "any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action." The observations of the learned Lord Justice therefore in his dissenting judgment were directed to a very narrow and technical point of mere procedure. He did not refer to the decision of Chitty J. in *Thwaites v. Coulthwaite*. (1)

In *Saffery v. Mayer* (2) one person advanced money to another—i.e., as his partner—for the purpose of making bets on horses on their joint account. The money so advanced was lost. It was held by the Court of Appeal that by reason of the Gaming Act, 1892, the person who had advanced the money could not maintain an action against the other for half of the amount so lost. In that case *Thwaites v. Coulthwaite* (1) was discussed. So far from being overruled it seems to have received the sanction of the Court. The Court did not suggest that there could be no partnership in a betting business. On the contrary, several passages in the judgments point to the opposite conclusion. Thus Collins L.J. said (3): "The bankrupt and the defendant were partners on equal terms in a joint adventure," and he added, "As at present advised, I should think that an account might have been ordered in the present case." So Stirling L.J. said (4): "The parties were to engage as partners in the adventure to be carried on by the defendant on their joint account."

The result of the authorities so far seems to be reasonably clear to the effect that a partnership may exist in a betting business. In 1908, however, the case of *Thomas v. Dey* (5) came before Darling J. He there held that the Court will not entertain an action for an account by one partner in a betting business against his co-partner. In the course of his judgment he said: "If there had been a partnership, as was alleged, it

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(1) [1896] 1 Ch. 496.

(3) [1901] 1 K. B. 16, 17.

(2) [1901] 1 K. B. 11.

(4) Ibid. 18.

(5) 24 Times L. R. 272.

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would have been one to carry on the business of a bookmaker, but the law did not recognize any such business as that. . . . He would not order an account to be taken, because he considered that to do so would be to act against public policy.” I may point out that the plaintiff there appeared in person, that no authorities whatever were so far as I can see cited to the learned judge, and I most respectfully think that his judgment did not accord with the existing decisions. In *Brookman v. Mather* (1) Avory J. took a view wholly differing from that of Darling J. in *Thomas v. Dey*. (2) The action was brought by one partner in a betting business against his co-partner to recover a sum due upon an account taken on the dissolution of partnership. The plaintiff succeeded and got judgment for the amount claimed. Avory J. pointed out that there was no evidence that the partnership business was carried on in a manner that was illegal within the Betting Act, 1853. He discussed several relevant decisions, and said : “As betting was not illegal per se there was no reason for saying that what was called the highwayman principle (Lindley on Partnership, 8th ed., p. 113) applied.” He pointed out that *Thomas v. Dey* (2) was decided without reference to *Thwaites v. Coulthwaite* (3) and the other decisions in which that case was discussed. This decision of Avory J. fully accords with *Johnson v. Lansley*. (4) I may here add that in *Harvey v. Hart* (5) Stirling J. (after considering *Bridger v. Savage* (6), *Higginson v. Simpson* (7) and *De Mattos v. Benjamin* (8)) had held that a partner in a betting business was entitled to an account as against his co-partner. Finally, I may cite *Keen v. Price* (9), decided by Sargant J. He there considered several of the authorities cited in this judgment, and held, following *Thwaites v. Coulthwaite* (3), that an action will lie by one partner in a bookmaker’s and betting business against the other for an account of the partnership dealings, although the form of account may be subject to a special

(1) 29 Times L. R. 276.

(5) [1894] W. N. 72.

(2) 24 Times L. R. 272.

(6) 15 Q. B. D. 363.

(3) [1896] 1 Ch. 496.

(7) (1877) 2 C. P. D. 76.

(4) (1852) 12 C. B. 468.

(8) 63 L. J. (Q. B.) 248.

(9) [1914] 2 Ch. 98.

provision. In the course of his judgment Sargant J. said (1): "Some remarks were made by Darling J. in *Thomas v. Dey* (2), an action for an account by one partner in a betting business against the other partner, in which the learned judge likened the case to that in which one highwayman sued his brother robber for an account, and in which the plaintiff's counsel was ordered to pay the costs; but the decision of Darling J. has been corrected by Avory J. in *Brookman v. Mather*." (3)

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Upon the decisions as they stand I think that the great balance of authority is in favour of the view that a partnership can exist in a betting and bookmaker's business. I so hold. It is true that such a partnership possesses one or more peculiar features by reason of the operation of the Gaming Act, 1892. But the absence of a non-vital though usual characteristic of partnership is not inconsistent, I think, with the legal relationship defined by s. 1, sub-s. 1, of the Partnership Act, 1890. If the Courts recognize a single proprietor of a betting business, I see no good reason in public policy why they should not recognize, as they have done, a betting partnership. I may add that by allowing betting partners to sue under s. 2 of the Gaming Act, 1835, it is probable that the object of that section will be aided rather than hindered.

I may finally say that in any event the point here raised is, when analysed and as applied to the present case, one of technical procedure only so far as regards litigation, for even if I had held that a betting partnership could not exist, yet the plaintiffs would still be jointly entitled to sue as co-promisees. The only difference is that in the case of partnership an action can be commenced in the name of the firm, whereas in the case of mere co-promisees it is necessary that the name of each plaintiff shall appear.

For the reasons given I am of opinion that Mr. Cannot's arguments must prevail and that this action is well brought by the plaintiffs as a firm. I find myself unable to follow the dictum of Fletcher Moulton L.J. in his dissenting

(1) [1914] 2 Ch. 102.

(2) 24 Times L. R. 272.

(3) 29 Times L. R. 276.

1921 JEFFREY v. BAMFORD.	judgment in <i>Hyams v. Stuart King</i> . (1) Judgment will therefore be entered for the plaintiffs for 97 <i>l.</i> 17 <i>s.</i> 4 <i>d.</i> with costs.
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Judgment for plaintiffs.

Solicitors for plaintiffs : *Bono & Nimmo*.

Solicitors for defendants : *Rider, Heaton, Meredith & Mills*.

J. S. H.

[IN THE COURT OF CRIMINAL APPEAL.]

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April 11.

REX *v.* MOLLOY.

Criminal Law—Indictment—Count containing two separate offences stated in the alternative—Uncertainty—Larceny—Fixtures—Simple Larceny—Indictments Act, 1915 (5 & 6 Geo. 5, c. 90), Sched. I, r. 5—Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), s. 8, sub-s. 1.

Rule 5 in Sched. I. to the Indictments Act, 1915, does not authorize the charging in one count of an indictment of two separate felonies in the alternative. Therefore an indictment under s. 8, sub-s. 1, of the Larceny Act, 1916, which charges a prisoner in one count that he "stole, or, with intent to steal, ripped and severed or broke," certain fixtures, is bad for uncertainty.

The precedent of indictment given in Archbold's Criminal Law (25th ed.), p. 553, is incorrect and must not be followed.

On an indictment under s. 8, sub-s. 1, of the Larceny Act, 1916, for stealing fixtures the prisoner cannot be convicted of simple larceny.

Reg. v. Gooch (1838) 8 C. & P. 293 followed.

APPEAL from conviction at Stoke-on-Trent Quarter Sessions.

The prisoner was charged on an indictment in the following form :—

"Statement of Offence :

'Larceny contrary to s. 8 (1.) of the Larceny Act, 1916.

"Particulars of Offence :

"John Molloy on January 8, 1921, at Longton in the county borough of Stoke-on-Trent in the county of Stafford, stole, or with intent to steal, ripped and severed or broke,

(1) [1908] 2 K. B. 696, 718.

one grate, one iron boiler with door and frame, two iron water cisterns and quantity of lead piping of the total value of 11*l.* 10*s.*, the property of William Martin, then being fixed to the dwelling house and premises the property of the said William Martin, situate in High Street, Longton, in the said county borough of Stoke-on-Trent."

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At the trial evidence was given that on January 5 the fixtures on the premises in question were in their normal condition; that on January 8 the cistern had been removed and smashed, the service cut, a boiler and door frame smashed and a grate removed, the smashed articles being in an outhouse; that on that same day—January 8—the prisoner was seen at the outhouse loading some of the articles on a wheelbarrow and was leaving with them when he was arrested. He said that a bricklayer had given the stuff to him. The prisoner was not represented and did not give or call any evidence. In his summing up, the Recorder told the jury that there was no evidence that the prisoner was the man who broke the cistern, etc., but that they might draw the inference that if he was the man who went the day after to collect the débris he must have known a good deal about the ripping and tearing down of the property, and that they must consider if they had any reasonable doubt whether the man who came and fetched the stuff away was not the man who had put it in the outhouse.

The prisoner was found guilty and sentenced to three years' penal servitude.

The prisoner appealed.

David Davies for the appellant. This conviction should be quashed. The indictment is laid under s. 8, sub-s. 1, of the Larceny Act, 1916, which provides that "every person who steals, or, with intent to steal, rips cuts severs or breaks" any fixtures, shall be guilty of felony. The section creates two separate offences, first, the offence of stealing fixtures, and secondly, the offence of ripping, cutting, severing, or breaking fixtures with intent to steal them. This indictment

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charges in the alternative in one count those two separate and distinct felonies, and is for that reason bad in law for uncertainty: *Cotterill v. Lempriere* (1), *Rex v. Wells* (2), *Rex v. Slater* (3); see also *Rex v. Jones* (4) and *Beresford v. Richardson*. (5) The indictment follows the form given in Archbold's Criminal Pleading (25th ed.), p. 553, and it has been suggested that it is justified by r. 5 of Sched. I. to the Indictments Act, 1915, which provides that "where an enactment constituting an offence states the offence to be the doing or the omission to do any one of any different acts in the alternative, . . . or states any part of the offence in the alternative, the acts, omissions . . . or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence." That rule does not permit of two distinct felonies being stated in the alternative in one count. Furthermore, there was no evidence that the appellant was the man who actually ripped and severed the fixtures, and he could not be convicted on this indictment of simple larceny: *Reg. v. Gooch*. (6) [He also referred to *Rex v. Millar* (7) and *Rex v. Molloy*. (8)]

J. H. Thorpe for the Crown said that he could not support the suggestion that r. 5 of Sched. I. to the Indictments Act, 1915, allowed the charging of two distinct offences in one count in the alternative.

The judgment of the Court (Darling, Avory and Sankey JJ.) was delivered by

AVORY J., who, after reading the indictment and s. 8, sub-s. 1, of the Larceny Act, 1916, continued: Sect. 8, sub-s. 1, was taken from s. 31 of the Larceny Act, 1861, which in its turn was taken from s. 44 of 7 & 8 Geo. 4, c. 29, and was intended to meet the case of persons stealing fixtures which, but for the statute, would not have been the subject of larceny at all because they were part of the realty. The indictment charges the appellant that he

(1) (1890) 24 Q. B. D. 634.

(2) (1904) 91 L. T. 98.

(3) (1903) 67 J. P. 299.

(4) [1921] 1 K. B. 632.

(5) [1921] 1 K. B. 243.

(6) 8 C. & P. 293.

(7) (1837) 7 C. & P. 665.

(8) (1914) 111 L. T. 166.

either stole the things or, with intent to steal, that he ripped and severed them. Those two offences are not necessarily committed by one and the same act; in other words, the act done may constitute one of the offences but may not constitute the other. A man with intent to steal may rip or sever fixtures but yet may not steal them, for in order to steal the things he must move them after they have been detached. That being so, it is obvious that this indictment charges the appellant with two felonies in the alternative—the felony of stealing the fixtures or the felony of ripping them with intent to steal. Upon the authorities such an indictment is clearly bad in law unless it can be cured, as was suggested, by any provision in the Indictments Act, 1915. The cases cited by Mr. Davies make it clear that where two offences are charged in the same count the indictment is bad for duplicity. So, according to the law before the Indictments Act, 1915, where offences were charged in one count in the alternative, the indictment was bad for uncertainty. It appears to have been suggested that the indictment may be supported under r. 5 of Sched. I. to the Indictments Act, 1915, which, so far as material, provides that “where an enactment constituting an offence states the offence to be the doing or the omission to do any one of any different acts in the alternative . . . or states any part of the offence in the alternative, the acts, omissions . . . or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence.” The question is, is s. 8, sub-s. 1, of the Larceny Act, 1916, an enactment which states the offence to be the doing or the omission to do any one of different acts in the alternative? The section, as I have already pointed out, deals with two different acts—the act of stealing and the act of ripping, etc., with intent to steal—and is not dealing with one act in alternative ways. Therefore the section does not come within the words of r. 5 as an enactment which states the offence “to be the doing or the omission to do any one of any different acts in the alternative.” The words of s. 8, sub-s. 1, providing that “every person who

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... with intent to steal, rips cuts severs or breaks " fixtures shall be guilty of felony afford an illustration of the case with which r. 5 was intended to deal. A person may do one of the different acts ; he may rip or cut or sever or break the fixtures with intent to steal, and r. 5 authorizes a count charging the prisoner in that way. The rule does not authorize a count charging the prisoner with stealing fixtures which involves the carrying or moving away of the articles, or, in the alternative, with doing any of the other acts of ripping, cutting, severing or breaking with intent to steal. Mr. Thorpe for the Crown has very frankly admitted that the only argument by which this indictment could be supported would lead to the conclusion that r. 5 authorized a count charging the prisoner with either stealing or forging a cheque. I have the best of reasons for saying that r. 5 was not intended to cover such a case as that. Reference has been made to the fact that this indictment has followed the form given in Archbold's Criminal Pleading (25th ed.), p. 553. That is not one of the authorized forms. None of the authorized forms justifies the inclusion of two separate offences in the alternative in one count. Notwithstanding the general accuracy with which Archbold's Criminal Pleading has been prepared, we must say that on this occasion the form given at p. 553 is incorrect and must not be followed.

There remains the question whether upon this indictment the appellant could properly be convicted at all. The Recorder in his summing up did not instruct the jury that it was necessary before they could convict the appellant that they should come to the conclusion that the appellant had himself ripped or severed the fixtures in question with intent to steal. The only evidence against the appellant was that he was seen with a barrow with some of the things coming from the shed where the articles which had been ripped or severed had been previously deposited. That of itself is no evidence that he was the person who ripped or severed them ; the evidence is quite consistent with the ripping and severing having been done by some other person. If the appellant had been indicted for larceny at common law of these things

from the shed he might have been convicted, for the things had then ceased to be fixtures. But he could not on this indictment, which is framed under the statute for stealing fixtures, be convicted of larceny at common law, and for this *Reg. v. Gooch* (1) is a direct authority.

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In these circumstances, although the point was not taken by the appellant at the trial, we must, now that the point is taken, decide it according to law, and in our opinion the appeal must be allowed and the conviction quashed. But as we are told that there is another indictment upon which the appellant has not been tried, he will now have to take his trial upon it.

Appeal allowed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for Crown: *Director of Public Prosecutions.*

J. S. H.

[IN THE COURT OF APPEAL.]

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MILLETT v. VAN HECK AND COMPANY.

Feb. 4.

Sale of Goods—Contract for Delivery at “fixed time”—Delivery within reasonable Time—Anticipatory Breach—Measure of Damages—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 51, sub-s. 3.

By s. 51, sub-s. 3, of the Sale of Goods Act, 1893, “Where there is an available market for the goods in question, the measure of damages” (for non-delivery) “is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver” :—

Held, that the rule in sub-s. 3, that if no time for delivery of the goods is fixed, then the measure of damage is to be ascertained by the difference between the contract price and the market or current price of the goods at the time of the refusal to deliver, does not apply to a case where the breach is an anticipatory breach.

Quære, whether a contract for delivery within a reasonable time is or

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is not a contract for delivery at a "fixed time" within the meaning of the sub-section.

The rule for ascertaining the damages stated.

Decision of the Divisional Court [1920] 3 K. B. 535 affirmed.

APPEAL from the decision of a Divisional Court. (1)

The plaintiff carried on business as a cotton waste merchant at Rochdale, and the defendants carried on business as cotton spinners and manufacturers in Holland. By six contracts made between January 10 and August 23, 1916, the plaintiff agreed to sell to the defendants for export to Holland a quantity of cotton waste, to be delivered f.o.b. Manchester Docks. The contracts provided that shipment of the cotton waste should be subject to Government permission to export.

When the contracts were entered into cotton waste could not be exported without the licence of His Majesty's Government, but at those dates and for a long time previously licences for export to neutrals were regularly and freely granted, and the plaintiff duly exported to the defendants large quantities of cotton waste under the contracts. In January, 1917, however, the export of cotton waste was absolutely prohibited by the Government, and licences for the export thereof to Holland could not be obtained, and the plaintiff was thereby prevented from exporting and delivering the balance of cotton waste under the contracts.

A correspondence then took place between the parties. On April 4, 1917, the defendants wrote to the plaintiff: "We are now in a position to revert to your recent communication re prohibition of export by the British Government. Of course it is understood that the contracts existing between us are kept on until such times as delivery can be made."

The plaintiff replied on April 16: "We are in receipt of your letter of April 4 re prohibition of cotton waste, and we are certainly agreeable to deliver the existing contracts between us as soon as ever possible. There seems to be no likelihood of shipping at present, owing to the material being required for munition purposes here. However, you can

rest assured that the goods will be sent forward as soon as the embargo is lifted."

The defendants wrote to the plaintiff on May 9: "We are in receipt of your favour of the 16th ult., from which we learn that you are certainly agreeable to deliver the existing contracts between us as soon as ever possible. Useless to say that we cannot manage keeping our mills running owing to the non-arrival of shipments from England. We sincerely hope however that the British Government will remove the embargo put on cotton waste ere long so that you will be able again to resume shipments to our firm."

On May 22 the plaintiff wrote to the defendants: "We are in receipt of your letter of May 9, contents of which we have noted, and as previously stated we are quite agreeable to deliver the existing contracts as soon as ever we receive shipping permission."

On June 27 the defendants wrote to the plaintiff: "We have pleasure in handing you under this cover certification of extension of the term of shipment of the following N. O. T. authorisations No. 157,602 and No. 157,601, with which please do the needful. Useless to say that our stocks are completely exhausted, and we, therefore, are anxiously awaiting your Government's permissions to you to resume shipment of our cotton waste."

The plaintiff replied on July 17: "We are in receipt of your letter of June 27 . . . and you can rest assured that as soon as the embargo is taken off we shall get some deliveries forward to you."

On August 8, 1918, the plaintiff wrote to the defendants refusing to be any longer bound by his contract to make deliveries to the defendants.

The defendants on October 17, 1918, accepted the plaintiff's repudiation of the contract.

The prohibition of the export of cotton waste was removed on January 16, 1919.

On January 8, 1919, the plaintiff commenced these proceedings, in which he alleged that the continued stoppage of the export of cotton waste operated so as to frustrate and

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defeat the commercial objects of the parties in entering into the contracts and rendered fulfilment thereof impossible, and he claimed a declaration that the six contracts in so far as they were unperformed were dissolved and determined, or alternatively that the plaintiff was entitled to determine the same.

The defendants by their defence alleged that the plaintiff had entered into a contract to deliver the balance of the goods after the removal of the embargo, and they counterclaimed for a declaration that they were entitled to recover from the plaintiff damages for his repudiation of that contract.

Greer J. held that the result of the correspondence between the parties was that they thereby modified their rights under the six contracts. The parties entered into a new and binding agreement that the deliveries under the six contracts should be suspended until the removal of the embargo, the plaintiff being willing to deliver and the defendants being willing to accept delivery of the balance of the goods after the embargo had been removed; and also that both parties contemplated at the time of entering into that arrangement that the removal of the embargo would only take place after the expiration of a substantial period of time. He accordingly refused to make the declaration which the plaintiff asked for, but he made a declaration that the defendants were entitled to recover damages for the plaintiff's repudiation of his contract, the damages to be assessed by an Official Referee.

That decision was affirmed by the Court of Appeal.

If the damages were assessed with reference to the market price of the goods on August 8, 1918, the date when the plaintiff repudiated the contract, there would be a large sum due to the defendants. On the other hand if the damages were assessed with regard to the market price of the goods on January 16, 1919, the date when the embargo was removed, they would, owing to a fall in the market, be merely nominal.

The Official Referee held that a date was fixed for the delivery of the goods—namely, the date of the removal of the embargo—but that a reasonable time thereafter must be allowed for the delivery of the goods; that the goods could not

have been shipped until March, 1919, and that even then the whole of the goods could not have been delivered at once ; that the defendants were entitled to recover damages for the plaintiff's breach of contract, notwithstanding that it was an anticipatory breach ; but that the defendants by not suing at once but waiting until the plaintiff brought his action and then setting up their claim by way of counterclaim kept the contract open for the benefit of both parties until the time for performance arrived ; and that the proper way to assess the damages was to take the market price of the goods from March, 1919, onwards, and ascertain from time to time what was the difference between the contract price and the market prices at the time when the goods could in the ordinary course of business have been delivered.

Both the plaintiff and the defendants appealed. Both parties agreed that the Court should lay down the principles on which the Official Referee should act in assessing damages without reference to the two notices of appeal.

The Divisional Court (Bray and Sankey JJ.) held that when a contract provided for delivery within a reasonable time, or within a reasonable time after a future date, it was not a contract for delivery at a fixed time within the meaning of s. 51, sub-s. 3, of the Sale of Goods Act, 1893. (1) They further held that the rule in sub-s. 3, that if no time for delivery was fixed, the measure of damages was to be ascertained by the difference between the contract price and the market or current price of the goods at the time of the refusal to deliver, did not apply to a case where the breach was an anticipatory breach. They laid down the following principle (2) : " We hold that *prima facie* the damages should be the difference in price between the contract price and the price at which the goods should have been delivered according to the terms of the new contract as decided by us. Deliveries will have to be made at different times, and this rule must apply to each delivery. This is however only a *prima facie* rule. If it can be shown by either party that the reasonable course for minimizing the damages would be otherwise this

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(1) The sub-section is set out in the headnote.

(2) [1920] 3 K. B. 543.

C. A. prima facie rule should not be applied. For instance, if it
 1921 could be shown that the reasonable course to be pursued
 MILLETT would be for the buyer to enter into a forward contract on
 v. the date when the repudiation was accepted, the damages
 VAN HEER should be assessed according to the difference between that
 & Co. price in that forward delivery and the contract price, and so,
 also, if it could be shown that the reasonable course to be
 pursued would have been to enter into a forward contract
 at some later date."

The defendants appealed.

Cyril Atkinson K.C. and *Cockshutt* for the defendants. No time was fixed in the contract for delivery, and therefore the delivery must be within a reasonable time. A reasonable time is not a "fixed time" within the meaning of s. 51, sub-s. 3, of the Sale of Goods Act, 1893. A fixed date is where a date for delivery is specified in the contract. If delivery is to be within a reasonable time, there is no time fixed for delivery within the sub-section: *Melachrino v. Nickoll*. (1) Sect. 29, sub-s. 2, draws a distinction between a fixed time and a reasonable time for delivery. The Divisional Court were right upon this point. The damages therefore must be assessed, under the rule in s. 51, sub-s. 3, as at the time of "the refusal to deliver"—namely, on August 8, 1918, when the plaintiff repudiated the contract. The date of the refusal to deliver is the date on which the damages should be assessed. In *Brown v. Muller* (2) and *Roper v. Johnson* (3), in both of which cases there was an anticipatory breach of contract, there was a fixed time for delivery.

[*Leigh v. Paterson* (4), *Josling v. Irvine* (5), and *Ashmore v. Cox* (6) were also cited.]

Sylvain Mayer K.C. and *Lowenthal* for the plaintiff were not called upon.

BANKES L.J. This is an appeal from a decision of the Divisional Court as to the proper method to adopt in order to

(1) [1920] 1 K. B. 693, 696.

(2) (1872) L. R. 7 Ex. 319.

(3) (1873) L. R. 8 C. P. 167.

(4) (1818) 8 Taunt. 540.

(5) (1861) 6 H. & N. 512.

(6) [1899] 1 Q. B. 436, 443.

arrive at the damages to which the successful party in the action is entitled. It is not necessary to state the facts; they are set out in the report of the case in the Divisional Court. (1)

The main point to be decided is whether the latter part of s. 51, sub-s. 3, of the Sale of Goods Act, 1893, applies to this case. This raises two questions. The first is whether the latter part of the sub-section applies at all except in a case of what is strictly speaking non-performance of a contract as opposed to an anticipatory breach arising from a repudiation of a contract. The second is whether, assuming that the section applies, the contract in this case is a contract in which no time is fixed for the deliveries. Now the second is, to my mind, a very important question upon which I desire to reserve my judgment. Opinions of very great weight have been expressed in reference to the matter. Bailhache J., in *Melachrino v. Nickoll* (2) has expressed the opinion that when s. 51, sub-s. 3, speaks of no time being fixed for delivery it refers to those contracts in which no mention of time is made and which, therefore, are to be performed within the indefinite period known as a reasonable time under the circumstances; and the same view is expressed by Bray and Sankey JJ. in their judgments in this case. I do not desire to express any opinion upon that point: I desire to reserve it until it arises for decision.

Upon the other question, on which the Divisional Court decided this case, I agree with their view, which shortly expressed is this: That the latter part of sub-s. 3 of s. 51 has no application to a case like the present, which is not the ordinary case of non-performance in the sense I have indicated, but which is the case of an anticipatory breach by repudiation of the contract before the time for performance arrives. I agree entirely with what Bray J. said in the Divisional Court as to the way in which the damages are to be ascertained. I do not wish to add anything to that, because I may say something which may seem to be at variance with what the learned judge said. In my opinion, the rule he has laid down

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(1) [1920] 3 K. B. 535. ? ?

(2) [1920] 1 K. B. 693, 696.

Why?

C. A. at p. 543 of the report in the Law Reports (1) is the correct
1921 rule and the one that should be applied by the Official Referee
MILLETT in assessing the amount of damages in this case.
v.
VAN HECK For these reasons, in my opinion, the appeal fails and must
& Co. be dismissed.

WARRINGTON L.J. I agree. I also desire to reserve my opinion upon the question whether or not a contract to deliver goods within a reasonable time is for the purposes of s. 51, sub-s. 3, of the Sale of Goods Act, 1893, a contract to deliver goods at a fixed time. That is a question which ought to be determined only when it is necessary to determine it, and after full argument on both sides. It is not necessary to determine it here, because, whether or not the view of the Divisional Court upon it is correct, their ultimate decision is right. The latter part of s. 51, sub-s. 3, on which their judgment turns, does not seem to me to touch the case of an anticipatory breach—that is, a repudiation of a contract before the time has arrived for its performance which has been turned into a breach giving a cause of action by the acceptance of the repudiation by the other contracting party. As to that I agree with what is said by the Divisional Court and by Bankes L.J., and I have nothing to add; nor have I anything to add as to the mode of ascertaining the damages laid down by the Court.

ATKIN L.J. I agree. I think that the construction of s. 51, sub-s. 3, of the Sale of Goods Act, 1893, contended for by the appellants would, if it were admitted, introduce a very serious anomaly into the administration of the law relating to the sale of goods, because the position is this: It is admitted that, if a contract is made for the sale of goods deliverable in the future by specified instalments at specified dates, and before the time has arrived for performance the contract is repudiated, and the repudiation is accepted, the damages have to be measured in reference to the dates on which the contract ought to have been performed. That

(1) [1920] 3 K. B. 543. The passage is set out above.

is beyond controversy. The law was so laid down by Cockburn C.J. in *Frost v. Knight* (1), in the Exchequer Chamber, and it was the law at the time when the code of 1893 was passed; and there is no reason to suppose that the code intended to alter it. The Lord Chief Justice said (2): "The promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." Therefore, if it was such a contract as I have suggested for delivery by fixed instalments at fixed times, then, although the action is brought in respect of the accepted repudiation, the damages would have to be assessed with reference to those fixed times. But it is said that, if no times have been expressed in the contract, and the contract would be construed by law as one for delivery by reasonable instalments over a reasonable time, even though those times might be ascertained as a question of fact by the jury, the plaintiff suing may not merely have an option, but is compelled, to fix his damages in reference to the market price at the time when the repudiation takes place. That, it seems to me, would introduce an anomaly entirely without any kind of principle to justify it. I am satisfied that the code never intended to make that distinction, or to vary what was the rule of law at the time when it was passed, a rule which has been recorded in countless decisions since the doctrine of repudiation of contract has received its development in *Frost v. Knight* (1)—namely, that the damages are to be fixed in reference to the time for performance of the contract subject to questions of mitigation. Therefore, I think that the view taken by the Divisional Court is right on this point.

Whether they are right in saying that a contract for delivery within a reasonable time is not a contract for delivery

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(1) (1872) 2 L. R. 7 Ex. 111.

(2) Ibid. 113.

C. A. at a fixed time, I say nothing. I do not determine it. I
1921 wish to reserve it. It will have to be determined after giving
MILLETT very serious consideration to the weighty opinions of
v. Bailhache J. in *Melachrino v. Nickoll* (1), and of Bray and
VAN HEER & Co. Sankey JJ. in this case. I think there is something to be said
Atkin L.J. on the other side. It is difficult to see why it should be said
that the contract for delivery at times which can be deter-
mined by a jury is not a contract for delivery at fixed times.
It seems to me that a meaning could be given to the words,
“if no time was fixed,” by reading them as referring to a
contract such as to deliver goods on demand or to deliver goods
as required by the purchaser. It might well be argued that
that would give a meaning to the words in question. However,
as I have said, I do not wish to determine it, especially in
view of the opinions that have been expressed by the learned
judges. For the reasons I have given I agree that the appeal
should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Rawle, Johnstone & Co., for
H. Whittingham & Son, Bolton.*

Solicitors for defendants: *Cunliffe, Blake & Mossman, for
Goulty & Goodfellow, Manchester.*

(1) [1920] 1 K. B. 696.

W. F. B.

MORGAN v. PARR.

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Mar. 22, 23.

Principal and Agent—Employment of Children in Street Trading—Selling Newspapers—Employment of Children Act, 1903 (3 Edw. 7, c. 45), s. 3, sub-s. 2; s. 5, sub-s. 1; s. 13—Education Act, 1918 (8 & 9 Geo. 5, c. 39), s. 13, sub-s. 1 (ii.).

The offence of employing a child in street trading within the meaning of s. 3, sub-s. 2, of the Employment of Children Act, 1903, may be committed where the relation between the defendant and the child is that of principal and agent; the enactment is not confined to the case of employment as a servant.

A child received from the respondent, a wholesale and retail newsvendor, newspapers which he proceeded to sell in the streets, paying the respondent for them at the rate of 9d. per dozen copies sold, the child making a profit of 3d. per dozen. He returned unsold copies to the respondent, who stated that if he saw the child destroying unsold copies he should prevent him if he could. The magistrate found that the relation of master and servant did not exist between them, and dismissed the information.

The Court, on the facts, *held* that the relation was that of principal and agent, and that the respondent had employed the child within the meaning of the Act, and must be convicted.

CASE stated by the Stipendiary Magistrate sitting at Aberdare, Glamorganshire.

At a Court of summary jurisdiction holden at Aberdare on October 20, 1920, an information was preferred by William Richard Morgan, the appellant, as clerk to the Urban District Council, Aberdare, against the respondent, Edward Parr, charging that "he the said Edward Parr on Saturday, September 18, 1920, . . . did unlawfully employ a child named William Richard Rees in street trading" contrary to the provisions of s. 3, sub-s. 2, of the Employment of Children Act, 1903 (3 Edw. 7, c. 45), as amended by s. 13, sub-s. 1 (ii.), of the Education Act, 1918 (8 & 9 Geo. 5, c. 39), which, so amended, provides that "A child shall not be employed in street trading."

Upon the hearing on October 20, 1920, and by admissions by counsel on the appeal, made to avoid the necessity of sending the case back for further findings of fact, the following facts were proved or admitted. The respondent was a

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wholesale and retail newsagent, and on Saturday, September 18, 1920, he handed to Rees a parcel of newspapers. Rees was born on February 3, 1910, and was therefore under fourteen years of age and a "child" within the meaning of s. 13 of the Act of 1903. Later on the same evening Rees was selling newspapers in the street. The respondent received 9d. per dozen from Rees on the newspapers sold by him and the unsold copies were returned to the respondent, who made a profit by way of discount upon the net sales. Rees made a profit of 3d. per dozen. The respondent exercised no power of control over Rees, and if Rees sold no papers he derived no gain. Rees was free to come and go as he thought fit and the respondent would not know until Rees came to the station whether he would be purchasing any papers for sale on any particular evening. In evidence the respondent stated that if he saw a boy tearing up papers, he should stop him if possible, and he spoke of Rees as being in his "employ."

On behalf of the appellant it was contended that the respondent had employed Rees in street trading within the definition of "employ" and "employment" in s. 13 of the Employment of Children Act, 1903, which "include employment in any labour exercised by way of trade or for the purposes of gain, whether the gain be to the child or to any other person," and was consequently liable to a penalty under s. 5, sub-s. 1. The respondent contended that the relation of vendor and purchaser only existed between him and Rees, and that Rees was not "employed" by him.

The Stipendiary Magistrate held that the relation of master and servant did not exist between the respondent and Rees, and that the papers were supplied to Rees on the ordinary trade terms, and that this was not a case of a child being employed within the meaning of s. 3, sub-s. 2, of the Act of 1903, and dismissed the information, but stated this case.

Kirkhouse-Jenkins for the appellant. The magistrate found that the relation of master and servant did not exist between the respondent and apparently on that ground refused to

convict. But it is not essential that that relation should exist in order that the child may be "employed" within the meaning of s. 3, sub-s. 2, of the Employment of Children Act, 1903. In *Reg. v. Reason* (1) a man who helped a postmaster at the latter's request to sort letters was held to be "employed" by the Post Office under 7 Will. 4 and 1 Vict. c. 36, s. 26, although his position in the Post Office was that of carrier only. The canon of construction must be applied, "that the mischief at which the statute is aimed must be considered when the words are difficult to construe": per Kay L.J. in *Collman v. Roberts*. (2) One of the mischiefs aimed at by the statute of 1903 was the employment of children in street trading, and if the decision of the magistrate is upheld the Act will be of little practical value. The relation between the respondent and the boy was that of principal and agent, and that is sufficient to constitute an "employment" of the latter by the former within the meaning of the Act.

[*Robinson v. Hill* (3) was also referred to.]

Harold Morris K.C. for the respondent. The evidence shows that the relation of vendor and purchaser existed between the respondent and the boy, and not that either of master and servant or of principal and agent; the boy had the papers "on the usual trade terms"—namely, the terms upon which the retailer sells to the newsvendor. Therefore there was no "employment" of the boy. It is necessary for the prosecution to establish the relation of master and servant, and this was a question of fact for the magistrate, who has negatived that relation, and there was evidence upon which he could so find.

[*Robinson v. Hill* (3); *Smith v. General Motor Cab Co.* (4); and *Stokes v. Mitcheson* (5) were referred to.]

[AVORY J. referred to *Reg. v. Negus*. (6)]

DARLING J. In my opinion this is a difficult case. I think it is necessary to begin by considering what was the

(1) (1853) 23 L. J. (M. C.) 11.

(2) [1896] 1 Q. B. 457, 460.

(3) [1910] 1 K. B. 94.

(4) [1911] A. C. 188.

(5) [1902] 1 K. B. 857.

(6) (1873) L. R. 2 C. C. 34.

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obvious intention of the Legislature when it passed the Employment of Children Act, 1903, entitled "An Act to make better provision for regulating the employment of children." I think it is plain that the intention was to give a very wide protection to children, and that the Legislature did not mean to be specially technical in its use of the words "employ" and "employment." That is shown by the definition clause 13, and by the way those words are used in various parts of the statute. Having stated that, we must consider what was the evidence before the learned magistrate, and whether there was sufficient evidence to justify the conclusion to which he came.

The facts are carefully set out in the case. Mr. Morris has very properly admitted that the respondent referred in his evidence to the boy in question as being "in his employ," and that he also said that if he had seen the boy destroying newspapers which he had handed to him he would, if possible, have stopped him from doing so. The magistrate decided that this was not a case of master and servant, and it seems to me that on that ground he decided that no offence had been committed by the respondent in allowing the boy to do what he did. I do not think however that that finding is exhaustive. It was contended by Mr. Morris for the respondent that the magistrate thought the case one of vendor and purchaser, although he has not said so in so many words. He finds that the papers were supplied to the boy on the ordinary trade terms, but he does not decide as a matter either of law or fact that this was a case of vendor and purchaser. I think on the facts as stated and admitted that the respondent did employ the boy to act as his agent. As the boy was of an age at which the statute protects him, I think that an offence was committed by the respondent, and that the decision of the magistrate was wrong and the appeal must be allowed.

AVORY J. I agree. In view of the admission of further facts which has saved us from the necessity of sending the case back to the learned magistrate, I am clearly of opinion

that this boy was in fact employed by the respondent as an agent within the meaning of the statute. I think the magistrate was right in holding that the relation of master and servant did not exist; but when he found further that the papers were supplied to the boy on the ordinary trade terms, and for that reason held that it was not a case of employing a child, I confess I do not understand what he meant by saying that the papers were supplied to the boy on ordinary trade terms. As my Lord has pointed out, he does not say that he was satisfied that the relation of vendor and purchaser existed between them; if he had said so I think he would have been clearly wrong on the facts. We have in the findings of fact a clear statement of the terms on which the newspapers were supplied to the boy.

In my opinion the boy was selling the newspapers as agent for the respondent, and therefore the respondent was "employing" him within the meaning of s. 5, sub-s. 1, of the Act, and I agree that the appeal should be dismissed and the case remitted to the magistrate for a conviction.

SALTER J. I agree. There is no question in this case of the exercise of parental authority. The relation between Parr and Rees was the result of contract. The contract was one of service, of agency, or of sale. If it was a contract of service then undoubtedly there would be "employment." If it was found that the contract was one of sale, then in my opinion a doubtful and difficult question would arise whether that could be said to be "employment" within the meaning and intention of the Act. The learned magistrate does not appear to have found that the relation of vendor and purchaser existed. He says that the papers were supplied to the boy on the ordinary trade terms, but I do not understand that, having regard to the case as a whole, a relation of vendor and purchaser existed. If the relation was that of principal and agent I have no doubt that there was "employment" within the meaning of the Act. I think we ought to infer from the case and from the facts admitted by Mr. Morris for the respondent

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1921 that the relation between the respondent and Rees was that
 MORGAN of principal and agent. That being so, I think there should
 v. have been a conviction.
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Appeal allowed and Case remitted.

Solicitors for appellant: *Rawle, Johnstone & Co., for W. R. Morgan, Aberdare.*

Solicitors for respondent: *Bell, Brodrick & Gray, for Kensholes & Prosser, Aberdare.*

W. L. L. B.

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[IN THE COURT OF APPEAL.]

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Employer and Workman—Compensation—Disputed Claim—No Weekly Payment made or agreed upon—Agreement for Compromise—Payment of Lump Sum in satisfaction of all Claims—Agreement embodied in consent Award—Subsequent Claim for War Addition—Whether barred by consent Award—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I., para. 17—Workmen's Compensation (War Addition) Act, 1917 (7 & 8 Geo. 5, c. 42) s. 1—Workmen's Compensation (War Addition) Amendment Act, 1919 (9 & 10 Geo. 5, c. 83), s. 1.

A workman having met with an accident in the course of his employment filed a request for arbitration claiming compensation on the ground that he was totally incapacitated by reason of the accident. The employers disputed their liability on various grounds and did not make or agree to make any weekly payment. At the hearing the parties informed the county court judge that they had settled the matter for a lump sum of 150*l.* The judge thereupon, at their request, made an award by consent for 150*l.* and agreed costs in full satisfaction of all claims in respect of the injury by accident arising out of and in the course of the employment. Subsequently, on July 7, 1920, the workman, being still incapacitated, filed a further request for arbitration, claiming that notwithstanding the payment to him of the 150*l.* he was entitled to be paid a further sum of 5*s.* per week to January 1, 1920, under the Workmen's Compensation (War Addition) Act, 1917, and 15*s.* per week after that date under the Workmen's Compensation (War Addition) Amendment Act, 1919. The county court judge made an award in the workman's favour. On appeal:—

Held, that the consent award was not a redemption of a weekly payment, but a compromise of a disputed claim for a lump sum.

Held, also, that as no weekly payment had ever been made or agreed

to be made there was no jurisdiction to make an award under the War Addition Acts.

Held, therefore, that the workman's claim failed and there must be an award in favour of the employers.

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APPEAL from an award of the judge of the Preston County Court sitting as an arbitrator under the Workmen's Compensation Act, 1906.

The facts are fully stated in the judgment of the Master of the Rolls and were shortly as follows : On August 14, 1919, the applicant met with an accident whilst in the employ of the respondents. On November 17, 1919, he filed a request for arbitration, claiming compensation, on the ground that he was totally incapacitated by reason of the accident, and he also claimed a further sum of 5s. per week under the Workmen's Compensation (War Addition) Act, 1917. On December 4, 1919, the respondents filed their answer, in which they put in issue the nature of the work, the cause of the injury, the particulars of the incapacity, the average amount which the applicant was then able to earn, and the amount claimed as compensation. They at no time made any weekly payment. On December 16, 1919, the arbitration came on for hearing, when the solicitor for the applicant and counsel for the respondents informed the county court judge that they had settled the matter for 150*l.* The judge thereupon at their request made an award, by consent, for 150*l.* and agreed costs, in full settlement of all claims in respect of the injury by accident arising out of and in the course of the employment.

Subsequently, on July 7, 1920, the applicant being still incapacitated filed a further request for arbitration, claiming, notwithstanding the payment to him of the 150*l.*, to be paid a further sum of 5s. per week under the Workmen's Compensation (War Addition) Act, 1917, to January 1, 1920, and 15s. per week after that date under the Workmen's Compensation (War Addition) Amendment Act, 1919. The respondents filed an answer in due course denying the applicant's right to further compensation. Their main defence was that the applicant, by having received the 150*l.* under the award, was estopped by it from claiming any further payments under the War Addition

C. A. Acts. The county court judge held that the payments under
 1921 the War Addition Acts were not redeemable, and made an
 award in the applicant's favour.
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 GOODIER. The respondents appealed. The appeal was heard on
 February 4, 7, 1921.

W. Shakespeare and *Lustgarten* for the appellants. This is not a claim for compensation under the Act of 1906, but for such payments as the respondent would have been entitled to under the Workmen's Compensation (War Addition) Acts, 1917 and 1919, if his claim for compensation had been adjudicated upon and a weekly payment awarded. It is submitted that the proceedings are misconceived, because if he were entitled under the War Addition Acts he would not need any award. The War Addition Acts operate automatically. Further, he is barred by the agreement for compromise which the parties were entirely competent to enter into: *Ryan v. Hartley* (1); *Williams v. Ministry of Munitions*. (2) In order to entitle the workman to the war addition under the Acts of 1917 and 1919 he must be entitled during total incapacity to a weekly payment by way of compensation under the Act of 1906. He cannot successfully claim the war addition when his claim for compensation under the Act of 1906 has been settled by way of compromise for a lump sum. It does not matter whether liability has been admitted or not. The parties have agreed upon a sum in full satisfaction of all claims under the Act. It cannot be said that there was any award in redemption of a weekly payment.

[They also referred to *Rawlings v. Hodgson*. (3)]

Compston K.C. and *C. L. J. Holt* for the respondent. It is not permissible to contract out of the Act of 1906, except as provided by s. 3.

[YOUNGER L.J. Compromising a claim under the Act is not contracting out of it.]

This case was treated in the county court as an application for the redemption of a weekly payment and by consent the

(1) [1912] 2 K. B. 150.

(2) (1919) 12 B. W. C. C. 213.

(3) (1918) 11 B. W. C. C. 73.

judge made the award. By s. 1, sub-s. 2, of the Act of 1917, the respondent is entitled to the war addition notwithstanding that the liability to make the weekly payment is redeemed. The compromise here is in effect the redemption of a weekly payment.

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This case must be dealt with on general principles. Here there is an agreement which either does or does not give the respondent the compensation to which he is entitled. If it does not then there is no agreement which is a bar to his claim: s. 3. Under s. 3, sub-s. 1, if a workman has at any time entered into an agreement which does not give him all that he is entitled to under the Act then there is no agreement which will prevent the Act from operating.

[LORD STERNDALÉ M.R. Where do you find any provision in the Act enabling an employer to redeem a contingent liability?]

In the proviso in para. 17 of Sched. I. which provides that "nothing in this paragraph shall be construed as preventing agreements being made for the redemption of weekly payments by a lump sum."

[LORD STERNDALÉ M.R. You can compromise or settle it, but you cannot redeem it.]

What you have to redeem under para. 17 is a weekly payment. Why should you not be able to redeem a payment before it has crystallized into a weekly payment? Sect. 1, sub-s. 3, enables any question as to the amount and duration of compensation to be settled by agreement between the parties, and it must therefore be open to them when they go before the county court judge to say that they have agreed, and the judge must then treat the case as if it were one in which weekly payments had been made for six months. There is nothing in any of the cases to the contrary effect.

In *Howell v. Blackwell's Executors* (1) the weekly payments had not been continued for six months.

[They also referred to *Clawley v. Carlton Main Colliery Co.* (2)]

W. Shakespeare in reply.

(1) (1912) 5 B. W. C. C. 293.

(2) [1918] A. C. 744.

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redeem weekly payments and there never have been any ?]

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There can be no redemption unless weekly payments have been made or agreed upon. The whole object of requiring the weekly payments to continue for six months is in order to afford some material on which the county court judge can determine whether or not the incapacity was likely to be permanent.

LORD STERNDALE M.R. This case arises under somewhat peculiar circumstances. I rather agree with the learned counsel who has just addressed us, that the argument has travelled over a considerable amount of unnecessary ground, because the case is covered by decisions of this Court; but the learned counsel for the respondents have addressed to us elaborate arguments, to show us that those decisions are wrong. That may be so; I do not know; but those arguments should be addressed to the House of Lords, because the decisions being decisions of this Court, we are bound by them.

The case arises in this way. The applicant was a workman in the employ of the respondents and he alleged that he had suffered an injury while in their employment on August 14, 1919. He filed his request for arbitration, stating that he was entitled to compensation for that reason. The respondents, in their answer, put in issue the particulars filed by the applicant, and they struck out of the printed form the words which referred to their denial of liability to pay compensation. Why they did so I do not know; I dare say they had a good reason for so doing. In the particulars of facts which the respondents desired to bring to the notice of the judge, they alleged "that any incapacity for work is not the result of accident as alleged." That seems to me to be a denial of liability, because if there was no incapacity from accident there was no liability under the Act. At any rate, it seems to me to be quite impossible to say that the liability was admitted. It was not.

(1) (1912) 5 B. W. C. C. 293.

In those circumstances the parties approached one another. No liability for compensation was ever admitted ; and there is nothing to show that any question of a weekly payment was ever discussed. The parties having come to an agreement then went into the county court, and asked the learned county court judge to make an award by consent, embodying the terms of their agreement. It was said that he was asked to do that as an order for redemption. If he was so asked, he certainly to my mind did not act upon the request, and I have the gravest possible doubt whether he would have had any power to do so, or any jurisdiction to make an order for redemption, in the circumstances. But he did not ; he made this award : " By consent I award to applicant the sum of 150*l.* and agreed costs in full settlement of all claims in respect of an injury by accident arising out of and in the course of his employment." There one office copy of the award stops, but another office copy goes on to add : " on the 14th of August 1919." I do not think the difference is at all material, but it seems to me very careless indeed that two office copies of an award should be issued which differ from one another. They might have differed in a material item. Then the award concludes : " And I order that the sum of 50*l.* be forthwith paid to the applicant."

The learned county court judge has expressed doubts as to his jurisdiction to make that award. I share those doubts. His jurisdiction, primarily, is to make an award for a weekly payment. He might afterwards order that such a weekly payment should be redeemed. He might, under r. 19, assuming that rule to be valid, make an award for a lump sum in compensation for an injury of this kind ; but I cannot find that there is any other jurisdiction in the learned county court judge to make an award for a lump sum of this kind, in compensation, and I am not satisfied by the learned counsel's argument that because he could have recorded this as an agreement, he could therefore make this award for a lump sum, because the effect of the two things would be the same. I doubt very much whether he had any jurisdiction to make an award for a lump sum in this way, even by consent ; but

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it is immaterial, because if it is not good as an award, it is good as an agreement, and the award consented to by the parties is, until some further proceedings are taken, conclusive evidence of the agreement to which they have come. Therefore there is an agreement for the payment and acceptance of a sum of 150*l.* in full settlement of all claims in respect of an injury by accident arising out of and in the course of his employment.

I will assume, without deciding it, that, for the purposes of this case, that means only full settlement of all claims under the Workmen's Compensation Act or Acts, and that it does not extend to any common law liability. The first point that is clearly decided, as it seems to me, by cases beginning with *Ryan v. Hartley* (1), and ending, so far as the cases to which we were referred are concerned, with *Williams v. Ministry of Munitions* (2), is that such an agreement as that is a valid agreement; that there is nothing to prevent a workman of full age and full capacity from making such an agreement, and that if he does so the agreement is a bar to further proceedings under the Workmen's Compensation Act of 1906. It was also decided in *Williams v. Ministry of Munitions* (2), that such an agreement must be taken to be an agreement under the provisions in the Act, and therefore one which can be recorded. I express no opinion as to whether that case was rightly or wrongly decided; it is not my place to do so, and I do not think it proper to do so.

Therefore, when this award was made, there was evidence of an agreement which the man was competent to make, and which would be effective in bar of any further proceedings under the Act. In addition to the cases I have mentioned I think that is also decided by *Rawlings v. Hodgson* (3), and there are other cases.

The man at that time, it is said—it is not in evidence, but I accept it as stated—thought that his injury at any rate would not necessarily cause total incapacity. It was thought

(1) [1912] 2 K. B. 150.

(2) 12 B. W. C. C. 213.

(3) 11 B. W. C. C. 73.

that the partial incapacity from which he was then suffering might be the full extent of the injury. One of the points which was raised before us, was that this order or award on the face of it did not and does not express what the parties really intended. The learned counsel wished to read a letter which had passed during the negotiations between the parties for a settlement in order to show that the award would read practically in this way: "In full settlement of all claims during partial incapacity"—thereby leaving it open for him to claim further compensation if total incapacity supervened.

There are several answers to that contention, each of them, to my mind, equally conclusive, but it is only necessary to mention one, and that is that no such point was ever taken in the Court below, and therefore cannot be taken here; and we must take the order as it stands. Total incapacity having supervened, a further request was then made for arbitration to be held under the Workmen's Compensation Act, 1906, and then underneath that heading is the addition "and the War Additions Acts," meaning thereby the Workmen's Compensation (War Addition) Act, 1917, and the Workmen's Compensation (War Addition) Amendment Act, 1919, the latter of which it is not necessary to refer to, because it only increased the amount that was payable under the Act of 1917. There is this difference between claims under these two Acts, that the Act of 1917 was in operation at the time that the settlement of all claims was made, whereas the Act of 1919 did not come into operation until seven days after the award was made.

The Act of 1917 provides (s. 1, sub-s. 1) "Where any workman is at any time during the period for which this Act continues in force entitled during total incapacity to a weekly payment by way of compensation under the Workmen's Compensation Act, 1906, he shall, whether the incapacity arose before or after the commencement of this Act, be entitled to receive from the person liable to pay the compensation, by way of addition to each such weekly payment payable in respect of any week within the said period, a sum equal to one-fourth of the amount of that payment." Then it is also provided

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(sub-s. 2) that "The additional weekly sum payable under this Act shall be deemed to be part of the weekly payment under the Workmen's Compensation Act, 1906," for certain purposes, "and shall, notwithstanding that the liability to make the said weekly payment is redeemed subsequently to the commencement of this Act, continue to be payable in the same manner as if that liability had not been redeemed."

I rather agree that the whole question, when you come back to it, after a great deal of discussion in this case is this : Is this an order for redemption of a weekly payment ? If there was a liability for a weekly payment, and that payment is redeemed by this order, then these later Acts would seem to apply ; but if this is not a redemption of a weekly payment but a compromise by which all liability under the 1906 Act is discharged by settlement then the condition precedent to the application of the Act of 1917 does not exist. There is no weekly payment to which the workman was entitled at the time of the passing of the Act of 1917, nor is there any such liability on the part of the respondents for a weekly payment, which has been redeemed. It has been decided quite clearly, that there cannot be a redemption of a weekly payment unless there has been a weekly payment to redeem, and that an agreement such as this, where no weekly payment has been made or agreed to, is not an agreement for redemption of a weekly payment. It is so stated perhaps as clearly as anywhere in the judgment of Swinfen Eady L.J. in *Rawlings v. Hodgson*. (1) The agreement in that case was as follows : "The employer will pay, and the workman will accept in addition to the weekly compensation already paid, the sum of 175*l.*, which sum the workman agrees to accept in full satisfaction and discharge of all claims and costs under the above Workmen's Compensation Act by reason of or on account of the accident." There had been some weekly payments made, but the amount had never been fixed. Swinfen Eady L.J. after stating the facts and reading para. 9 of Sched. II. and the proviso to para. 17 of Sched. I. as to agreements for the redemption of a weekly payment by a lump sum, said :

(1) 11 B. W. C. C. 73, 77, 80.

"It is unnecessary to come to the Court; it is unnecessary to wait until an agreement to pay a lump sum has been in operation for six months; the parties may agree; but there must be first an agreement as to the weekly payment. There must, however, be consent as to what is to be redeemed, before you can arrive at the lump sum which is to be payable in its place." I cannot help thinking that the learned county court judge must have had that case and others to the same effect in his mind when, if he were asked to make an order for redemption, he made the order he did, because it is perfectly obvious that it is not an order for redemption. It is an order for the settlement, not of the weekly amount that had to be paid, but of the liability under the Act which had never been admitted, and of any payment that might be ordered to be made, if there was a liability.

Now, on the hearing of this application the learned judge was clearly of that opinion at first, because after stating the matter he puts forward the argument of counsel for the respondents in this way: "He (i.e., counsel) says, 'I concede that if the workman has a right to receive a weekly payment, the bonus cannot be dealt with, and cannot be settled; but before the workman can say that he is entitled to a bonus, he must show that he has some right under the Act of 1906.' Mr. Lustgarten contends that he has no such rights because of the settlement of his rights under the Act of 1906 for 150%. On the other hand, Mr. Fazackerley says you will find in s. 1, sub-s. 2, of the War Addition Act that the man is entitled to a bonus which 'shall, notwithstanding the liability is redeemed, continue to be payable in the same manner as if the payment had not been redeemed.' Mr. Fazackerley relies upon this, and says that if he has exercised his right to compromise, it is only a redemption of a weekly payment, and he is still entitled to any war additions. At the present time, I am against him on that argument. I do not think the compromise is a redemption, but it is a novel and a very important point, and I must take time to consider my decision."

I think that the first impression of the learned judge was right, but he came to a different conclusion after consideration,

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and he made his award in this form : “ I find that the applicant has been totally incapacitated.” Then he finds that he is an odd lot in the labour market. Then he goes on : “ On Dec. 16, 1919, arbitration proceedings came on for hearing in this Court, and the solicitors for the applicant and respondents, by consent, applied to convert the arbitration proceedings into an application to redeem ”—to redeem what ?—“ to redeem the contingent liability of the employers to make a weekly payment by reason of the accident, by payment of a lump sum of 150*l.*, and agreed costs, and after considering all the circumstances and the adequacy of the amount agreed upon, I, by consent, made an award in favour of the workman for 150*l.* in full settlement of the workman’s claim, as set out in that award.” Before being settled, this award was sent, as I am told was the practice in that and some other county courts, to the different parties, to see whether they agreed upon the terms of the order. The clause which I have read was protested against by the respondents’ solicitor, but the learned judge made it in that form.

It seems to me that that makes it even clearer that the learned judge did not make, and did not intend to make, an order for redemption of a weekly sum. He could not have said that he did, because there was no weekly sum to redeem, but what he did make was what he calls an award in redemption of contingent liability. There is no power in the Act that I can find to make an order for redemption of a contingent liability, but there is power in the parties to consent to a compromise by the settlement of a contingent liability, if he means by that a liability which has not yet been ascertained, and that is what he did.

Then the learned judge delivered a judgment which I think, with respect to him, really comes to this. “ I have grave doubts whether I had any power to make an award for the lump sum which I did. I do not think I have power to make an award for a lump sum as compensation, but I have power to redeem, and make an order for redemption of a weekly payment. Therefore the order that I did make must have been one for redemption, because I have no power to

make any other." I think the learned judge perhaps overlooked that his power to make an order of redemption, in the circumstances of the case, had no more existence than his power to make an award for 150% as a lump sum, because on the authorities I have referred to, there being no weekly payment, there could be no order for redemption of a weekly payment.

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In these circumstances, it seems to me that the award which the learned judge has made for payment under these later Acts is wrong. It has been decided, as I have said, and we must accept it, that a man can make such an agreement as this. The only thing that was said in derogation of these cases which decide that an agreement can be made, was that they do not refer to s. 3 of the Act of 1906, which deals with what is called "contracting out." I do not think the fact that that section was not referred to, even if it applies, is any ground on which we can disregard the authorities. They are there. I will only say this, that, to my mind, it is by no means clear that the section has any application. I do not say that it has not, as it is not necessary to decide that point. I think, however, it may very well not have been referred to for the reason that it was taken to apply to an agreement to exclude a scheme other than an approved scheme, by which the employer and the workman undertook to carry on their relations outside the provisions of this Act altogether, and without giving to the workman the additional right of compensation which is contained in this Act; that is to say, to leave him, in the case of any accident, subject to the liability of having to prove, in order to get compensation, that either the employer himself at common law, or somebody under the authority of the employer under the Employers' Liability Act, had been negligent, and that it was not intended to prevent a contract by which, admitting that the provisions of the Act apply, the parties agree to compromise a possible liability under the Act. That may be the reason why the section was not referred to, but whether that be so or not, there is the decision. Here there is an agreement by which these persons did contract themselves, not out of the Act,

C. A. but out of any further proceedings as to liability under the
1921 Act. When that was done, the applicant ceased at once,

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as it seems to me, to be entitled to anything, either by way of a weekly payment or otherwise, under the Act, and that being so, he does not fulfil the condition which it is necessary for him to fulfil in order to obtain additional compensation under either of these later Acts. As I have pointed out, the liability under the Act of 1917 was in existence at the time the settlement was made, and I do not see how that could be excluded, in any case, from the settlement. If that be excluded, it is very difficult to see how anything could be awarded under the Act of 1919, because that is only supplementary to the Act of 1917, and increases the amount, assuming a man to be entitled to compensation under the Act of 1917.

For these reasons, taking the authorities which are binding on us, I think the learned judge's decision was wrong, and the applicant was not entitled to any further compensation after the making of that agreement which is embodied, rightly or wrongly, in a consent order, and that therefore there should be an award in favour of the respondents, with costs here and below.

SCRUTTON L.J. I do not profess to regard the judgment I am about to give as a satisfactory one, because, in my view, the provisions of the Act which we have to construe on this subject are very obscure, and but for decisions of this Court—which again are subject to a qualification I shall have to make later in my judgment—I think it would be very likely that I should come to an absolutely different conclusion from the one I am about to come to.

The case arises in this way. The war made the purchasing power of money much less than it had been, as some of us know to our cost. But some persons were fortunate enough to get allowances by Act of Parliament for that drop in purchasing power. Amongst them were workmen who had obtained compensation under the Workmen's Compensation Act, 1906, so the Workmen's Compensation (War Addition) Act, 1917, provided that, where a workman is at any time

during the period for which this Act continues in force, entitled during total incapacity to a weekly payment by way of compensation under the Workmen's Compensation Act of 1906, he shall be entitled to receive a sum equal to one-fourth of the amount of the weekly payment, in addition; and the later Act of 1919 increased the proportion to three-fourths.

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The particular workman says: "I was entitled during total incapacity to a weekly payment by way of compensation under the Workmen's Compensation Act, 1906." To that the answer is made: "You were not; because by an order made with your consent in proceedings under that Act, you accepted 150*l.* in full settlement of all claims in respect of that Act, and you cannot therefore make any further claim." To that the workman replies: "But the War Addition Act has said that notwithstanding that the liability to make the said weekly payment is redeemed subsequently to the commencement of this Act, the war addition shall continue to be payable as if that liability had not been redeemed." The answer made to that is this: "Yes, but what has happened is this. This settlement was a compromise of all liability under the Act, and is not a redemption of a liability to make weekly payments, but is a compromise of possible contingent liabilities, which is not the same, under the decisions of the Court of Appeal, as a liability to make weekly payments."

When I look at the Act apart from the decisions, I personally find it extremely puzzling. The Act gives the workman the right to have compensation in accordance with Sched. I. when an accident has arisen out of and in the course of his employment. The schedule provides in its commencement for two things: If the workman injured has died, a lump sum is to be paid, calculated in a particularly carefully defined way; if the workman has not died, but suffers total or partial incapacity, a weekly payment is to be made, calculated according to certain defined rules. Paragraph 1 of Sched. I. says nothing about a lump sum to a living workman for total or partial incapacity, and provides no rules by which a judge can assess such a lump sum. The lump sum jurisdiction of the judge is confined to cases of death. Later on in the schedule,

C. A. para. 17, there is a provision that where any weekly payment,
1921 being a weekly payment which a judge is authorized to make
HAYDOCK under para. 1, has been continued for not less than six months,
v. the liability may be redeemed on application by the employer,
GOODIER. by the payment of a lump sum, rules for ascertaining which
Scrutton L.J. are then given. So far, Parliament is carefully controlling both
the amount of the weekly payment and the amount of the
lump sum. Paragraph 17 concludes: "Provided that nothing
in this paragraph shall be construed as preventing agreements
being made for the redemption of a weekly payment by a
lump sum." That, if it means anything, means that certain
agreements for redemption of a weekly payment not in accord-
ance with the provisions of the schedule, are not to be
forbidden by the actual provisions of the schedule, as far as
they have gone.

Then one comes to Sched. II., which contains the provisions
as to arbitration, para. 9 of which provides that where the
amount of compensation under the Act has been ascertained,
or any weekly payment varied, or any other matter decided
under the Act, either by a committee or by an arbitrator or
by agreement, a memorandum thereof is to be sent to the
registrar. Paragraph 10 provides that unless the memorandum
is sent in and registered, an agreement as to redemption of a
weekly payment is not to be enforceable. The memorandum
is to be sent in, and the registrar is to be satisfied as to its
genuineness; and para. 9 (*d*) provides that where it appears
to the registrar that an agreement as to redemption of a
weekly payment by a lump sum is inadequate, he may refuse
to record it, and refer the matter to the judge.

To make the matter a little more complicated, when we
come to the rules which are made under the Act, we find there
is an elaborate series of rules which contemplate the payment
into Court of a lump sum by the employer in cases where the
workman is not killed, but is merely injured, and the acceptance
of that sum by the workman.

Now what is the result of all that? I do not propose to
say what I should have thought but for the decisions of the
Court of Appeal, except that it is very likely I should

have gone wrong. There is a series of decisions of the Court of Appeal: *Ryan v. Hartley* (1), *Rawlings v. Hodgson* (2), and *Williams v. Ministry of Munitions* (3), in which it has been held that a workman of full age is at liberty to compromise his claim under the Act, and that when he does so before his weekly payment has been settled under the Act, or before having been settled it has continued for six months, he is at liberty to do that, and the provisions to which I have referred as to the registrar being satisfied as to the adequacy of the consideration do not apply. I gather from the decisions that it does not matter that a memorandum of the agreement is not registered, because it is not an agreement for a weekly payment within the Act.

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None of those decisions refers to the provisions of s. 3. Under the old Employers' Liability Act it had been decided in *Griffiths v. Earl of Dudley* (4) that a workman of full age might contract himself out of the Act. In my view, to meet that decision, at the end of sub-s. 1 of s. 3 of this Act, after providing that workmen might enter into schemes with their employers provided that there was a certificate of an authority that those schemes were at least as good or better and more favourable to the workmen than the provisions of the Act, there is inserted the proviso that: "save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act."

None of the three decisions I have mentioned refers to or discusses the effect of that proviso at all, as to which it is at least arguable that it was inserted to stop the effect of the decision of *Griffiths v. Earl of Dudley*. (4) I do not think I am entitled to say I am not bound by those decisions because the members of the Court who gave them do not mention that provision. It is no use my expressing an opinion as to what I think would have been the effect of that provision on the decisions. The Court has given a decision on the Act, which includes that provision, and I must take it that they gave their decision after reading the provisions of the Act.

(1) [1912] 2 K. B. 150.

(3) 12 B. W. C. C. 213.

(2) 11 B. W. C. C. 73.

(4) (1882) 9 Q. B. D. 357.

C. A. They do not mention the exact effect that they give to that provision.
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What then is the effect of that, if I turn back to the War Additions Act? This workman is not, and has not been since 1919, when the order was made, entitled to a weekly payment by way of compensation under the Workmen's Compensation Act, 1906, because for a lump sum paid he has agreed to give up all claim to it; and his answer that he is entitled to the war additions notwithstanding the liability to make the weekly payment is redeemed, fails because the Court of Appeal has held that a compromise before the amount of the weekly payment has been ascertained is not a redemption of the weekly payment.

Under those circumstances and for those exact reasons I think I am precluded by the decision of the Court of Appeal from giving effect to the claim of the workman in this case.

I think that the practice which the county court judge alleged to exist, in a case where a workman and an employer have agreed to a lump sum in settlement, of turning the claim before the Court into an application to redeem a weekly payment, and of the judge's ordering it to be recorded, requires complete reconsideration, in view of the decisions of the Court of Appeal, because, as at present advised, it does not seem to me to be in accordance with those decisions. But whether that be so or not, for the reasons which I have indicated which turn upon the decisions of the Court of Appeal to which I have referred, I think the learned judge here came in the second instance to a wrong conclusion—I think his first conclusion was right before he reserved his judgment and put it into writing—and therefore that the appeal should be allowed.

YOUNGER L.J. I agree in thinking that this appeal must be allowed. It is, in my judgment, important to observe that in the proceedings before the learned county court judge the award made by consent of the parties on December 16, 1919, was accepted as regular in every particular. It was so accepted, the learned judge says, by both parties. That

is important, because the real burden of counsel's argument for the workman before us was that the order did not correctly or at all express the arrangement to which on December 16 his client really consented. If that be so, he must, I think, raise that contention, if it be still open to him, in some other proceedings. This present arbitration rests, and this appeal must be determined on the footing that that order, properly construed, means what it says, and that to that order, so construed, the workman duly consented before it was drawn up and recorded.

On that view, the only questions before us, as I see them, are two: First, What is the meaning of the order? and, secondly, Is the order, so long as it stands, a bar to the present application of the workman?

As to the meaning of the order, there can be, I think, no doubt. It appears to me quite plainly to mean, and only to mean, that the sum of 150*l.*, with agreed costs, was, by consent of both parties, awarded to the workman, as the order says: "in full settlement of all claims"—certainly, if I may interpolate the words "of his own"—"in respect of an injury by accident arising out of and in the course of his employment on Aug. 14, 1919"—that being the accident particularised in the workman's application for arbitration on November 17, 1919, and in respect of which liability to pay compensation was denied by the respondents' answer of December 4, 1919. At the date of the consent order no weekly payment had been made, much less agreed to. The order was not in form, nor can it, in my judgment, be properly construed as being, an order for the redemption of a weekly payment by the payment of a lump sum. It was, in my judgment, in effect, as it says, an order taken by consent, settling, by the payment of a lump sum, a liability under the Act, theretofore disputed. If that be its true effect, the order, while it stands, is a complete bar to the applicant's present proceedings, unless it can be established by him that such an order is of no force, because it records an agreement not permitted by the Act.

As a result of the decisions of this Court, such a construction cannot, as I think, be entertained by us; but I must not be

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taken as at present advised to give any encouragement to the view that apart from these judgments, an agreement—not of course open to objection on the ground of duress, fraud, mistake, or the like—to compromise a disputed claim under this Act is prohibited by the fact of its being entered into by a workman of full age. My view is that the power to compromise their disputes being inherent in all persons of full contractual capacity, that power is not in any particular case to be regarded as taken away by any other than very plain statutory words, words which I have not myself hitherto found in this statute. But in this Court, the point is not, I think, open at all. If this consent order had been in the form of an agreement inter partes, the case of *Ryan v. Hartley* (1) clearly shows that it would have been a complete bar to these proceedings by the workman, even if unrecorded, while the later case of *Rawlings v. Hodgson* (2), also in this Court, shows that if an application to record such an agreement had been made to the registrar, he would have been bound to accede to it on being satisfied that the agreement was genuine, as before the learned county court judge this order was in terms admitted to be. Further, this Court in *Williams v. Ministry of Munitions* (3) has said that the decision of the House of Lords in *Clawley v. Carlton Main Colliery Co.* (4) was not intended to overrule either of these decisions. If, then, the workman would make anything of this point, he must seek to do so in the House of Lords. It is not open to him here.

But in form, this document of December 16, 1919, is an award by consent, made by the arbitrator, not an agreement between the parties. Does that make any difference? In my opinion it does not, and in my judgment *Howell v. Blackwell's Executors* (5), which was cited to us this morning, is strongly confirmatory of this view. This consent order is in substance a recorded memorandum of award (see Workmen's Compensation Rules 1913–1917, r. 97, sub-r. 5); it is as Lindley L.J. said in *Wilding v. Sanderson* (6), an order based

(1) [1912] 2 K. B. 150.

(2) 11 B. W. C. C. 73.

(3) 12 B. W. C. C. 213.

(4) [1918] A. C. 744.

(5) 5 B. W. C. C. 293.

(6) [1897] 2 Ch. 534, 550.

on and intended to carry out an agreement come to between the parties so that it ought to be treated as an agreement which incidentally can be properly set aside on any ground on which an agreement in the terms of the order could be set aside.

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Unless, therefore, the workman can say that such an agreement, had it remained in that form, would have been no bar to his present proceedings, he must, in my judgment, fail in these proceedings, and on this appeal. The fact that the agreement is embodied in a consent order in no way strengthens his position in these proceedings, as I think. Accordingly for these reasons I think the appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Ponsford & Devenish, for Peace & Darlington, Liverpool.*

Solicitor for respondent: *A. T. Plant, for Smith & Fazackerley, Preston.*

W. I. C.

[IN THE COURT OF APPEAL.]

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Revenue—Excess Profits Duty—Business having no pre-war Existence—Liability to Duty—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), ss. 38, 39, 40, Sch. IV., Part II.—Finance Act, 1916 (6 & 7 Geo. 5, c. 24), s. 45, sub-s. 2; s. 69—Finance Act, 1917 (7 & 8 Geo. 5, c. 31), s. 20, sub-s. 1—Finance Act, 1918 (8 & 9 Geo. 5, c. 15), s. 34—Finance Act, 1920 (10 & 11 Geo. 5, c. 18), s. 44, sub-s. 3; s. 45.

Upon the true construction of the Finance Acts, 1915 to 1920, trades or businesses commenced after the beginning of the war are properly liable to assessment to excess profits duty.

Decision of Rowlatt J. [1921] 1 K. B. 64 affirmed.

APPEAL from the decision of Rowlatt J. upon a case stated by Commissioners for the Special Purposes of the Income Tax Acts. (1)

(1) [1921] 1 K. B. 64.

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In October, 1919, the appellants Mr. Norris, Mr. White, and Mr. Browning (called for the purposes of the assessments and this appeal the "Cape Brandy Syndicate"), appealed against assessments to excess profits duty for the accounting periods March 11, 1916—December 31, 1916, and January 1, 1917—September 17, 1917. The three appellants were members of different firms, but the assessments in question were made in respect of profits arising from certain transactions undertaken by them on their joint account and not on behalf of their respective firms. In 1916 the appellants agreed to purchase certain brandy from the Cape Government on joint account. They first bought 100 casks, at the same time inquiring how much more was available, and, later in the same year, they bought two further lots of 1500 casks each. These 3100 casks constituted the whole amount the Cape Government had to offer, and the fact that the purchase was made in three instalments was because the appellants were not aware, in the first instance, how much there was for sale. Their intention was to buy all that was available. After the purchase the appellants sold some of the brandy for shipment to the East; the remainder they shipped to London where, on its arrival, it was blended with French brandy purchased by the appellants for the purpose. The brandy so blended was sold on commission on behalf of the appellants. There were about 100 transactions of sale in all, the first taking place on July 1, 1916, and the last on September 17, 1917. The appellants received the profits of the sales after deduction of the agents' selling commissions and the expenses incurred on the appellants' behalf. It was admitted that the appellants' intention in purchasing the brandy was to sell the whole of it at a profit. None of the appellants had previously or since been engaged in a similar transaction.

For the appellants it was contended that the profits in question were capital profits on the realization of a speculative investment, and were not profits arising from any trade or business carried on by the appellants; that an isolated and exceptional transaction did not amount to the carrying

on of a trade or business; alternatively that if the profits arose from a trade or business, the trade or business did not commence until 1916, and any profits arising from a business commencing after August 4, 1914, were not chargeable to excess profits duty. For the respondents it was contended that the profits in question arose from a trade or business carried on by the appellants, and were chargeable to excess profits duty. The Commissioners upheld the respondents' contention, and their decision was affirmed by Rowlatt J.

The appellants appealed.

Hon. Sir William Finlay K.C. and *Bremner* for the appellants. Two points were argued before the Commissioners and before Rowlatt J.—namely, first, whether the appellants were carrying on a trade or business or only engaged in an isolated transaction, and secondly, if they were carrying on a business whether they were liable to be charged with excess profits duty. As to the first, Rowlatt J. held that there was evidence upon which the Commissioners could find, as they did, that the appellants were carrying on a trade or business. We do not now contend that they were not.

Upon the second point Rowlatt J. held that the Finance (No. 2) Act, 1915, did not of itself impose the duty upon businesses commenced after August 4, 1914. It is submitted that he was right in so holding. He held further, however, that s. 45, sub-s. 2, of the Finance Act, 1916, which has to be construed together with the Act of 1915, must be treated as an exposition of the law by Parliament that post-war businesses are liable to pay excess profits duty. As to that it is submitted that he was wrong. Upon the Act of 1915 there is no ambiguity at all. Sect. 38, the charging section, s. 40, sub-s. 2, and Sch. IV., Part II., para. 4, show that the legislation was intended to deal only with businesses having a pre-war existence. On the Act of 1915 alone looking at the manner in which the schedule is introduced and at the schedule itself, having regard to the principles of interpretation adopted by the Master of the

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Rolls and Younger L.J. in *Inland Revenue Commissioners v. Gittus* (1) with reference to the combination of Act and schedule, it is impossible to say that excess profits duty is chargeable in respect of businesses commenced since the commencement of the war.

It is admitted that the Legislature thought that the tax was imposed on such businesses by the Act of 1915. But in fact it was not. If it is so charged by the Act of 1916, then there is no machinery applicable to the case.

[SCRUTTON L.J. referred to the Finance Act, 1920, s. 44, sub-s. 3, and s. 45.]

That no doubt shows that the Legislature thought that post-war businesses were chargeable to the duty under s. 38 of the Act of 1915. If they were not, the Legislature cannot alter the law by displaying an erroneous view of it: Maxwell's Interpretation of Statutes, 6th ed., p. 544. Rowlatt J. in effect treated the Act of 1916 as the decision of a Court on the effect of the Act of 1915. He was wrong in doing so: *Ex parte Lloyd*. (2) Assuming that post-war businesses are not taxed by the Act of 1915 they cannot be brought in by the Act of 1916 because the machinery provided by Sch. IV., Part II., para. 4, for arriving at the profits of a pre-war year is not applicable to a post-war business. The schedule cannot be made to apply to anything which is not included in its declared object. When once it is admitted that the business is outside the Act of 1915 then there is no machinery adaptable to the case: *Colquhoun v. Brooks*. (3) The Act of 1920, s. 44, sub-s. 3, shows no doubt that the Legislature contemplated that they had taxed these post-war businesses, but the mere fact that the Legislature introduces relief from certain taxation does not have the effect of imposing the taxation which was not in fact imposed. Taking the Act of 1916 as it stands it is impossible to supply the necessary machinery.

Attorney-General v. Clarkson (4) shows that where the Legislature has in an Act of Parliament used language which

(1) [1920] 1 K. B. 563, 576, 584.

(2) (1851) 1 Sim. N. S. 248, 250.

(3) (1889) 14 App. Cas. 493.

(4) [1900] 1 Q. B. 156.

is ambiguous, and in a later Act has used language which shows what meaning it attached to that in the earlier Act, the earlier Act is to be construed in the light of the words used in the later Act. But here there is no ambiguity and that case does not apply.

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Sir E. Pollock S.-G. and *R. P. Hills* for the Commissioners.

It is submitted that Rowlatt J. was wrong in holding that the Act of 1915 did not charge post-war businesses with the liability to duty. Sect. 38 of that Act, fairly looked at, clearly imposes the charge. Sect. 39, which defines the trades and businesses to which the Act applies, is in the widest terms: "all trades or businesses (whether continuously carried on or not)." It is said that no machinery is provided by the Act for computing the excess profits of a post-war business because such a business cannot have a pre-war standard of profits. But by Sch. 4, Part II., para. 4, "where there has not been one pre-war trade year, the pre-war standard of profits shall be taken to be the statutory percentage on the average amount of capital employed in the trade or business during the accounting period." That must be read as meaning where there has not been any pre-war trade year. All businesses are included, and two standards for ascertaining excess profits are provided—pre-war standard and percentage standard—and where it is necessary to find the pre-war standard you are referred to the fourth schedule. Where you have a collecting section or a schedule providing a method of carrying out the taxation imposed by an Act too narrow a construction must not be adopted. Rowlatt J. has adopted a curiously narrow interpretation, and has overlooked the wide scope and intention of the Act. When properly construed it clearly covers post-war businesses. If that be not so, then the Act of 1916 interprets the Act of 1915 so as to include such businesses: s. 45, sub-s. 2, and s. 69.

The Legislature have acted as their own interpreters of the earlier Act. *Attorney-General v. Clarkson* (1) is conclusive as to that.

Hon. Sir William Finlay K.C. in reply.

(1) [1900] 1 Q. B. 156, 165.

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LORD STERNDALE M.R. This is an appeal from Rowlatt J., who held that the appellants were liable to be assessed to excess profits duty. It raised two questions—one of fact, whether the appellants were carrying on a trade or business or only engaged in an isolated transaction, and the other whether, assuming they were carrying on a business, they were liable to be charged with excess profits duty.

The first question is of importance only with regard to this case. The second is of far-reaching importance because, if it be decided in favour of the appellants, the result will be that no persons carrying on a business which began after the commencement of the war can be charged with excess profits duty at all. The questions arose in these circumstances. One of the three appellants, early in 1916, heard that the Government of Cape Colony had a quantity of Cape brandy to dispose of. He got the assistance of two friends in the speculation and they bought over 3000 casks of this brandy. Some of it was allowed to go to other countries, but the greater part of it was brought to London. These three gentlemen were all members of different firms of wine merchants, and when the brandy came to London it was blended with French brandy purchased by the appellants, the blending being done by their firms, and sold in England under the description of old vatted brandy. It was sold from time to time in different sales ranging from July, 1916, to September, 1917, and profits were made upon the sales.

The first question, which as I have said is one of fact, is whether the appellants were carrying on a trade or business. The Commissioners decided that they were, and were not merely engaged in an isolated transaction. That was affirmed by Rowlatt J., and counsel for the appellants—very properly, if I may say so, in the face of those findings—did not argue that matter before us. We start therefore with the position that they were carrying on a trade or business which was begun after the commencement of the war. It was not begun in fact till 1916.

The next question, whether, in those circumstances, they are chargeable with excess profits duty, depends upon the

construction of the Finance Acts of 1915 to 1920, and the contention on behalf of the appellants is that, under those Acts, there is no power to charge excess profits duty on any business which began after the commencement of the war. The first Act to be considered is the Finance (No. 2) Act of 1915. The first section of importance is s. 38. Sect. 38, sub-s. 1, provides that: "There shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which this Part of this Act applies, in any accounting period which ended after the 4th day of August, 1914, and before the 1st day of July, 1915, exceeded, by more than £200, the pre-war standard of profits as defined for the purposes of this Part of this Act, a duty (in this Act referred to as 'excess profits duty') of an amount equal to 50 per cent. of that excess." Sub-sect. 2 provides for the way in which the accounting period is to be determined, and reading it shortly, it provides that where a business has been in the habit of making up its accounts for a definite period, that is to be the accounting period; but where that is not so, then the Commissioners of Inland Revenue may determine what is the accounting period. There are two accounting periods with which we have to deal in this case. Neither of them comes directly under the Act of 1915, because that only dealt with accounting periods from August, 1914, to July, 1915. The first accounting period with which we have to deal comes under the Finance Act, 1916, which deals with accounting periods from July, 1915, to August, 1917 and the second accounting period comes under the Finance Act, 1917, which deals with accounting periods from July, 1917, to August, 1918. Then s. 39 of the Act of 1915 provides: "The trades and businesses to which this Part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting" certain businesses, with which I need not deal. Sect. 40 provides first for the way in which the determination of profits is to be arrived at, then it deals with the question

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of the pre-war standard, and provides, by sub-s. 2, that "The pre-war standard of profits for the purposes of this Part of this Act shall, subject to the provisions of this Act, be taken to be the amount of the profits arising from the trade or business on the average of any two of the three last pre-war trade years, to be selected by the tax-payer (in this Part of this Act referred to as the profits standard) : Provided that if it is shown to the satisfaction of the Commissioners of Inland Revenue that that amount was less than the percentage standard as hereinafter defined, the pre-war standard of profits shall be taken to be the percentage standard." Then it provides what the percentage standard shall be, and I do not think it necessary to read that. Then it goes on : "The provisions contained in the Second Part of the Fourth Schedule to this Act shall have effect with respect to the computation of the profits of a pre-war trade year, and the provisions contained in the Third Part of the Fourth Schedule shall have effect with respect to the ascertainment of capital for the purposes of this Part of this Act." The argument upon that Act, pausing for a moment before I go to the schedule, is this : It is said, first, that it contemplates an excess profit—an excess profit over what ? The excess profit in an accounting period over a pre-war standard, that is to say, pre-war standard as defined for the purposes of this Act. But a pre-war standard, it is said, only means a standard which is in existence before the war, and therefore unless there be something in the definition of pre-war standard in the Act, it is said that the charge imposed by this section cannot apply to any business in respect of which no comparison can be made with any pre-war standard, because there is not any pre-war period or any pre-war standard with which to compare it. For the definition reference is made to Sch. 4, Part II., and the important part of it is this. The heading is "Pre-war Standard." It speaks of the way in which the profits are to be computed, and then proceeds in this way in para. 4 : "Where owing to the recent commencement of a trade or business there have not been three pre-war trade years, but

there have been two pre-war trade years, the pre-war standard of profits shall be taken to be the amount of the profits arising from the trade or business on the average of those two years, or, at the option of the tax-payer, the profits arising from the trade or business during the last of those two years," that evidently cannot apply in ascertaining the pre-war standard of a business that did not exist until after the war. Then "and where there have not been two pre-war trade years, but there has been one pre-war trade year, the pre-war standard of profits shall be taken to be the profits arising from the trade or business during that year."

Now that is a standard which cannot be applied to a business which did not exist till after the war. Then there follows the only one which can apply: "And where there has not been one pre-war trade year, the pre-war standard of profits shall be taken to be the statutory percentage on the average amount of capital employed in the trade or business during the accounting period." The argument is this, that reading that with the previous part of the clause, it can only mean this: Where there has been some period of pre-war trading, but there has not been a whole year, or, as Rowlatt J. expressed it, where there has been less than one pre-war trade year.

If it is to be read in that way, then it does seem very difficult to bring within the scope of this Act a business which began after the war, because it can only be taxed by a comparison with its pre-war standard as defined by the Act: and if the schedule, which determines how the pre-war standard is to be arrived at, necessarily pre-supposes some standard applicable to a business carried on before the war, it is very difficult to see how a business beginning after the war is included. Unless there be a charging section in one of the subsequent Acts, the only charging sections are to be found in this Act, and therefore, although this does not refer to the accounting periods with which we have to deal, it is, unless something be found in the subsequent Acts, the only Act under which the excess profits duty can be charged.

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Now what is said on behalf of the Commissioners of Inland Revenue is this, that the words "where there has not been one pre-war trade year" are not confined to cases in which there has been some part of a year but not the whole, but may also be read "where there has been no pre-war trade year."

That was rejected by Rowlatt J. on the construction of this Act alone. For reasons that I shall give directly I do not think it is necessary to decide whether Rowlatt J. was correct in saying that, apart from any other Act, this Act of 1915 could not and did not refer to businesses commenced after the war.

My inclination, I think, apart from any other Act, would be to agree with the construction put upon this by Rowlatt J. ; but, as I say, it is not necessary to decide that for reasons which I shall give directly. I must say that in all this legislation with which we have to deal, it does seem as if the framers had done their best, with conspicuous success, to raise difficulties on the construction of the Act, and as if, if they had only considered the matter perhaps a little more, the sections might have been made so plain that the taxpayer would know whether he was taxed or not, and no Court would need to have any dealing with the legislation. Unfortunately that has not been done, and we have to deal with questions which are certainly difficult. The Finance Act of 1916, which extended the operation of the Act of 1915 to a later accounting period, in s. 45 contained this provision. After continuing the charge of excess profits duty, as I have said, down to August 1, 1917, it went on to provide: "In the case of trades or businesses commencing after the 4th day of August, 1914, the rate of duty shall be 60 per cent. of the excess in respect of any accounting period ending after the 4th day of August, 1915." When it was dealing with other businesses the provision was this: "S. 38 of the principal Act shall, as respects excess profits arising in any accounting period beginning after the expiration of a year from the commencement of the first accounting period, have effect as if 60 per cent. of the excess were substituted as the rate of duty for 50 per cent. of the excess."

The curious result of those two parts of the sub-section is this, that there may be one accounting period at any rate in which a new business, if I may call it so, was paying 60 per cent. while an old business would be paying 50 per cent., showing that the matter again had not been at all carefully considered. It also shows in my opinion that the framers of the Act of 1916 were of opinion that the Act of 1915 did include those new businesses. For the moment I pass over the question of whether that is a charging section, imposing a charge upon new businesses which did not exist under the old Act. It is provided that Part III. of this Act, which is the Part dealing with excess profits duty, shall be construed together with Part III. of the Finance (No. 2) Act, 1915. That is the part also dealing with excess profits duty.

In 1917 the excess profits duty was extended, as I have said, to a later accounting period. I do not think it is important to read that Act, because I do not think there is anything said which throws any light upon whether businesses commenced after the war were included in the charge or not. But that Act which governs the second accounting period which we have to deal with here, contains this provision: "Part III. of this Act shall be construed together with Part III. of the Finance (No. 2) Act, 1915," and does not mention the Act of 1916. That is a matter to which I shall have to refer again later. There were subsequent Acts extending the duty to later accounting periods, to which I need not refer. There was an Act in 1920 (10 & 11 Geo. 5, c. 18) to which I think reference must be made. Part IV. of that is the part which refers to excess profits duty, and it provides by s. 44, sub-s. 3: "In the case of a trade or business which is owned or carried on by any person who has served during the war as a member of any of the naval or military forces of the Crown, or of the Air Force or in service of a naval or military character in connection with the war for which payment was made out of money provided by Parliament, or in any work abroad of the British Red Cross Society or the Order of St. John of Jerusalem, or any other body with similar objects, and

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which was commenced by that person for the first time, or having been wholly discontinued by him during the war or some part of the war was recommenced by him, after his demobilisation or discharge, sub-section 1 of section 38 of the principal Act"—that is the Act of 1915—"shall have effect as though 'five hundred pounds' were substituted for 'two hundred pounds.'" That is to say, in the case of a person in those particular services, he shall not pay any excess profits duty until the excess amounts to at least 500*l.* But obviously in giving that exemption to persons who had begun their businesses in those circumstances, it again contemplates as being clear that those businesses which commenced after the war are liable to excess profits duty and would be liable for anything above the excess of 200*l.*, but for this privilege which is given to them.

It then goes on to say, in s. 45, sub-s. 1: "For the pre-war standard of profit there shall, on the application of the tax-payer, be substituted a standard (in this section referred to as 'the substituted standard') of an amount equal in the case of a trade or business which had no pre-war trade year, to the statutory percentage on the average amount of capital employed in the first accounting period." Therefore it speaks there of a business which had no pre-war trade year, and contemplates that such a business might and would be chargeable with excess profits duty. I think it is clearly established in *Attorney-General v. Clarkson* (1) that subsequent legislation on the same subject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier. As I have said, taking the Act of 1915, the words which are relied upon really, not entirely, but most strongly, as showing that what I may call post-war businesses were

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not included in the Act, are the words "where there has not been one pre-war trade year." I do not find it possible to say that those words are not capable of two constructions. I have mentioned the two constructions. One would exclude post-war businesses; one would not do so. I will not say it would include them because if they are not excluded they are included by s. 39. I think those are two possible constructions. It is perfectly obvious that the Act of 1916 and the Act of 1920 both assume that the Act of 1915 was so framed as to include post-war businesses, and therefore it seems to me to assume and really to direct that the second construction, which does not exclude post-war businesses, is the right construction of Part II. of the fourth schedule to the Act of 1915. That was the view that was taken by Rowlatt J. He said this (1): "I have come to the conclusion that s. 45, sub-s. 2, of the Act of 1916 extended the scope of the Act of 1915." I do not personally like to put it quite in those words. I do not say it extends the scope, but I agree with what he goes on next to say: "I must treat this exposition in the Act of 1916 in the same way as if it had been given by a Court binding upon me, compelling me to construe the Act of 1915 in a way that I could not otherwise have done."

Then after saying a little more, he goes on: "Although there is no authority precisely in point, the only effect I can give to the legislation is to say that the interpretation of the Act of 1915 given by the Act of 1916 must enure for the purposes of construing similar Acts, although not containing the same words as the Act of 1916." That disposes of the matter, subject to this, that it is said that although that may be quite right as to the first accounting period, it is wrong as to the second accounting period, because that is governed by the Act of 1917, and the Act of 1917 takes no notice of the Act of 1916, and is only to be construed with the Act of 1915, and as the Act of 1917 does not contain the interpreting clause, s. 45, sub-s. 2, to which I have referred, of the Act of 1916, the appellants must escape for

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the second accounting period. I do not think that is right, although I must say again I can see no reason whatever why the framers of this legislation should have gone out of their way to leave out a reference to the Act of 1916 in the Act of 1917, when as a matter of fact they put it in, in, I think, all the subsequent Finance Acts which were passed. It is quite unintelligible to me why they should have done it, but I do not think it makes any difference.

I was wrong in saying all the subsequent Acts, because the Act of 1920 is the same as the Act of 1917: "Part IV. of this Act shall be construed together with Part III. of the Finance (No. 2) Act, 1915." I see in the 1920 Act it is put in one way in one place, and in another way in another, so far as I can see. What I have read is the last section, s. 64: "Part IV. of this Act shall be construed together with Part III. of the Finance (No. 2) Act, 1915." In s. 51, on the contrary, there is this provision: "In this part of this Act"—that is Part IV.—"references to the principal Act"—the principal Act is the Act of 1915—"or to any provisions of that Act, shall be construed as references to that Act, or those provisions as amended and extended by any subsequent enactment."

Sect. 34 of the Act of 1918 says: "The Finance (No. 2) Act, 1915 (in this Part of this Act referred to as 'the principal Act'), as amended or extended by any subsequent enactment." The words in the 1917 Act are only "as amended, shall so far as relates to excess profits duty apply," and so on. As I say, the point with regard to this second accounting period is: Can the Act of 1917 be said to apply to that accounting period, although the Act of 1916 is not mentioned in it? In my opinion it can. When you say that the Act of 1916 and the Act of 1915 are to be construed together, then it seems to me that, when the Act of 1917 says it is to be construed with the Act of 1915, it must be construed with the Act of 1915 as construed together with the Act of 1916. Therefore it seems to me that that point fails also.

It was also argued that even if s. 45, sub-s. 2, of the Act of 1916 did not interpret the Act of 1915, it was itself a

charging section under which excess profits duty could be levied. I do not in the least dissent from that argument. I think it is very likely correct, but I prefer to base my judgment on the ground that I have mentioned.

I think therefore on all the points the appeal fails and must be dismissed with costs.

SCRUTTON L.J. I arrive at the same result as Rowlatt J., but, as I arrive at it by a method which I think is different and which, I think, my learned brethren do not prefer to their own, I express my judgment in my own words.

Three gentlemen engaged in a transaction, and the question is whether it comes within the Finance Act, which charges trades or businesses with excess profits duty. [The Lord Justice described the nature of the transaction and continued:] The first question argued before Rowlatt J. was, whether that was a trade or business as distinct from one transaction. Inasmuch as there were over 100 sales of this brandy extending over 18 months, it appears to me that there was abundant evidence on which the Commissioners could find that it was a trade or business, and counsel for the appellants very properly in this Court did not contest the finding of the Commissioners, affirmed by Rowlatt J., that it was a trade or business.

The next question is the really important one of general application, and it is whether, under the series of Finance Acts, businesses started after the war began are liable to excess profits duty.

Considering that the war began in 1914 and that the excess profits duty was first imposed in 1915, it is very curious that it should take six years for this question to come to the Court of Appeal. It either suggests that the proceedings in ascertaining revenue liability are very dilatory, or that the point had not such merits as made them conspicuous to people desiring to escape the payment of excess profits duty. However that may be, it has now arrived in the Court of Appeal. The two accounting periods in which it suggested that this tax should be levied are the accounting

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As I have understood the argument, it comes to this. It is quite true that Parliament says that, but, when you come to look into their machinery, they have not provided how you are to find out what the 60 per cent. is, and therefore the business is not chargeable.

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I go to the Act of 1915, and I find that excess profits duty is to be levied on the profits arising from any trade or business to which this Part of the Act applies. What is the business to which this Part of the Act applies? "All trades and businesses (whether continuously carried on or not) of any description carried on in the United Kingdom"—not "all trades and businesses carried on before the war in the United Kingdom"—but "all trades and businesses carried on in the United Kingdom," in respect of certain accounting periods. This business was carried on in the United Kingdom and it was carried on during the accounting periods. So far, why is the Act not to apply? The tax is to be levied on profits which exceed the pre-war standard of profits as defined. I look to see where the pre-war standard of profits is defined, and I find that I am sent to Part II. of the Fourth Schedule, where I find a clause pointing out what is to be done in case there have not been three pre-war years of business. Where there have not been three pre-war years of business, but have been two, you take the average of the two. If there have not been two but there has been one, you take the profits during that year; and where there has not been one pre-war trade year then you entirely abandon the pre-war standard and go to the statutory percentage on the capital employed in the trade or business during the accounting period, which is post-war. So if there has not been one pre-war trade year, you entirely throw over pre-war and look at a post-war figure entirely.

When I have to construe that statute, reading into it a clause, "In the case of trades or businesses commencing after the war the rate of duty shall be 60 per cent.," it seems to me that the only intelligible way to read it is to assume that Parliament intended their means of assessing to relate to businesses commencing after the war which they expressly said they were going to tax. And therefore as to the 1916 period, as to which I have to look to a combined Act of 1915 and 1916, it seems to me that there are clear words charging the particular business for the particular period, and providing a mode of calculating which can only be

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made intelligible and applicable to the subject matter which Parliament has stated in express words it intends to tax, by assuming that when Parliament says "not one pre-war trade year" they mean "not one or any part of one."

I may say that, if I am to look at the subsequent Acts, I find that view justified by the provisions of the Finance Act, 1920, to which the Master of the Rolls has referred about the taxing of the businesses started by demobilised soldiers after the war, which are clearly assumed to be within the Act of 1915. There is, too, a provision in s. 45, sub-s. 1, of the Finance Act, 1920, that there shall be a standard "of an amount equal in the case of a trade or business which had no pre-war trade year," which appears to me again to point to post-war businesses, and the phrase is repeated in s. 26 of the Act of 1917. So much for the Act of 1916. For the second accounting period I have to look to the Act of 1917. The Act of 1917 begins as the Act of 1916 did: "The Finance (No. 2) Act, 1915. . . . shall apply. . . . to any accounting period ending on or after the 1st day of August, 1917, and before the 1st day of August, 1918." This accounting period is covered. Sect. 40 of the Act of 1915 again makes the businesses referred to businesses carried on in the United Kingdom. There is no express statement in the Act of 1917 about post-war businesses, but there is a statement in s. 28 that references to the Act of 1915 shall be construed as references to that Act or to any provisions as amended by any subsequent enactment; and, in my view, the provision in the Act of 1916 is an amendment or alteration of the Act of 1915. It is made clearer by the phrase used in the later Acts, "amended or extended," but in my view "amended" and "amended or extended" substantially mean the same thing, and I only regret that those who drafted these Acts should have used different language, and so brought about the necessity of a long argument to determine what they meant. It seems to me, however, that the legislation has the result of bringing both those accounting periods within the charging sections in the Acts of 1916 and 1917,

and it is not necessary, in my opinion, to express any opinion as to the effect of the Act of 1915 by itself. I do not assent to or dissent from the view at which Rowlatt J. arrived. When some post-war business with an accounting period in 1915 comes before the Court it will be time enough to decide what is the effect of the 1915 Act alone. In this case there is no accounting period coming within the 1915 Act only.

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For these reasons, which are not quite the reasons put forward by Rowlatt J., though I do not desire to say that I differ from them—I only say I prefer to put it in the way I have done—I think the appeal should be dismissed.

YOUNGER L.J. I am of the same opinion. The result of the discussion which has taken place in this Court, and a reference to the judgment of the learned judge from whom this appeal comes have demonstrated, I think, that there are more roads than one by which the conclusion may be reached that the appellants in this instance are subject to this tax. It is of course conceded by the appellants that if a business, commenced for the first time after the war, is brought under the excess profits duty by the Act of 1915, the subsequent Acts which have fixed further accounting periods will automatically bring that business within their charging provisions. And accordingly the Solicitor-General, in dealing with the case which was made against him by Sir William Finlay, elected mainly to rely upon the contention that, upon the true construction of the Act of 1915, the business of these appellants has been brought directly under charge.

The learned Judge has said in his judgment that it seemed to him quite impossible to hold that the Act of 1915 did impose this excess profits duty upon a person in respect of a business that had no pre-war existence.

Speaking for myself, I am not able to arrive with the certainty that the learned judge has expressed, at the same conclusion. Indeed, with reference to businesses generally, the result of the full discussion here, has I think been to

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persuade me that, even without the assistance of the Act of 1916, one might have arrived at the conclusion, on the construction of the Act of 1915 alone, that they were included. But with regard to the particular kind of business with which we are concerned in this case, a business, namely, which is included, in s. 39 of the Act of 1915, as one which is not continuous, it is in my judgment much easier to say that, upon the true construction of the Act of 1915, that kind of business was included even if it had had no kind of commencement until after the war.

Now of course Sir William Finlay, in dealing with this part of the case, rightly attached very great emphasis to the expressions in the Act of 1915 relating to a pre-war standard of profits, words which connote that there must have been some kind of business carried on by which pre-war profits could have been earned. If the expression, however, be analysed and investigated, it will be found that while, if that pre-war standard of profits is arrived at with reference to profits, the existence of a pre-war business is necessarily involved in the section, yet if the pre-war standard of profit is, as it may be, arrived at with reference to what is called the percentage standard, there is no such necessity at all; because the percentage standard is arrived at without reference to profits earned by this business or that business; it is a certain rate of profit which is deemed to have been earned by any business in the period prior to the war. Accordingly the use of the words "pre-war standard of profits," when applied to the percentage standard as distinct from the profits standard, does not in any way, as it seems to me, involve of necessity that the business should have continued at all, or have been in existence at all, before the war. When you get rid of that idea you do find, in s. 39 of the Act of 1915, a definition of businesses to which the Act is to apply that is extraordinarily wide in its terms. And amongst other businesses to which the Act is so to apply is a business of the kind with which we are here concerned—namely, a business which is said to be one not continuously carried on.

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The argument of the appellants involves this view, that in order that a business not continuously carried on may be brought under charge by the Act of 1915, there must have been some non-continuous carrying on of that business at some period more or less remote from the passing of the Act, before the beginning of the war, so that a business not continuously carried on is, under the Act of 1915, brought or not brought into charge by the accident whether at some previous stage of the owner's existence he had or had not carried on that non-continuous business.

I myself should not have thought that that was the meaning of the phrase "whether continuously carried on or not," as I find it in s. 39 of the Act. It appears to me that the words indicate a business non-continuously carried on during the period of charge, and they have not necessarily, or at all, any reference to a pre-war existence. And if one had any doubt upon that subject on the Act as it stands, then it appears to me that the Legislature has resolved that doubt by s. 44, sub-s. 3, of the Act of 1920, to which the Master of the Rolls has referred, because that Act, dealing with persons who were engaged on working abroad for the Red Cross Society, or the Order of St. John of Jerusalem, or who were in the military service of the Crown or the Air Force or any service of naval or military character in connection with the war, expressly provides that, in the case of a non-continuous business carried on by them, and commenced after the war, they are to be subject to charge, and subject to the charge which is referred to in the Act of 1915, because they get a certain advantage, in the sum of 500*l.* being inserted in that Act for their benefit, instead of a sum of 200*l.* which applies to everybody else. It appears to me therefore that, so far as non-continuous businesses are concerned, with which at the moment we alone have to deal, you find a statutory assertion and recognition, in the Act of 1920, that these businesses were always subject to the Act of 1915, even although they were for the first time commenced after the war.

That would be enough to dispose of this case having regard

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to the peculiar character of the business, which it is now admitted is a business within the meaning of the Act.

Therefore from my point of view I need not say more. But I agree that, if the business be of a continuous character, the construction of the Act of 1915, which is not in this respect assisted by the Act of 1920, is certainly not so clear. I think however when one looks to find what is the real difficulty which, even as to these businesses, stands in the way of the assertion that they are included in the Act of 1915, one finds that that difficulty is confined, in the last analysis, to the proviso in the second paragraph of s. 40, which provides that "if it be shown to the satisfaction of the Commissioners of Inland Revenue that that amount"—that is the amount of the profits—"was less than the percentage standard as hereinafter defined, the pre-war standard of profits shall be taken to be the percentage standard."

Now that proviso is difficult to understand. I cannot myself, as at present advised, find any very intelligible reason why it should have been inserted at all. It seems to mean, so far as words are concerned, that the subject, where his pre-war standard of profits is less than the percentage standard, is by this proviso compelled to accept—I use the word advisedly—the standard which is worst for the Revenue, and it seems also to be designed to protect the Revenue from some supposed reluctance on the part of a subject to elect to take that standard which is best for himself. It certainly is a very strange proviso. But whatever it may mean it does seem undoubtedly to imply this, that there must have been a business in respect of which it was possible for the subject, the tax-payer, to prove that there was a certain sum in respect of pre-war profits, the accuracy of which he had to establish to the Commissioners. And if it stood there it would, I think, be difficult, as a mere matter of construction, to say that that did not necessarily imply that the business in question must have existed before the war.

But when you go to the second part of the Fourth Schedule, to which by the same section you are directed for

the purpose of ascertaining the pre-war standard, then you find, in para. 4, a provision applicable to businesses which have not existed for a year before the commencement of the war, which makes the statutory percentage the only pre-war standard, and which ex necessitate absolves the subject from the necessity of proving to the Commissioners that which under s. 40, sub-s. 2, he would, apart from that provision, be called upon to prove, and if the subject in that case is absolved from the necessity of proving any pre-war profits in the strict sense of the words, then it appears to me that it is no great stretch to say that, where there has been no pre-war business at all, the subject is equally entitled, if the words of the Act are sufficiently wide to cover him, to have the percentage standard applied to the profits of his business whensoever commenced.

Accordingly it does seem to me that if you take the whole of this Act together, applying it with regard to non-continuous businesses, it does apply to such businesses commenced after the war. That reasonable plainness is emphasized, and I think almost to demonstration, by the section from the Act of 1920 to which the Master of the Rolls has referred. With regard to other businesses the question, I agree, is left in doubt, but in such slight doubt that any subsequent statutory recognition of the opposite position would, I think, be sufficient to resolve it. It appears to me that we do find in the different sections which have been referred to by my Lord and by the Lord Justice sufficient statutory recognition of that point of view, and accordingly I am prepared, taking for this purpose the view of the learned judge, to hold that even if the section of the Act of 1915 were itself less clear, with regard to the particular business with which we are here concerned, that business would be directly brought into charge by virtue of the provisions in the subsequent Act.

I only desire to add this. I should be quite prepared, if it were necessary, to accept the view which has been expressed by Scrutton L.J. as to the effect of the Act of 1916 upon this case. I should be quite happy to arrive at the

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C. A. conclusion in the way in which he has arrived at it, as well
 1921 as in the way which I myself have chosen. Whichever be
 selected it seems to me that the appeal must be dismissed.

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Appeal dismissed.

Solicitors for appellants : *Mackrell & Ward.*

Solicitor for respondents : *Solicitor of Inland Revenue.*

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[IN THE COURT OF APPEAL.]

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Feb. 17.

GIBAUD *v.* GREAT EASTERN RAILWAY COMPANY.

Railway Company—Bailment—Deposit of Goods for safe Custody—Cloak-room Ticket—Conditions—Exemption from Responsibility for Goods above specified Value.

The plaintiff claimed damages for the loss of a bicycle deposited by him with the defendants at one of their stations. Upon leaving the bicycle he received a ticket upon which was printed the following condition : "The company will not be in any way responsible in respect of any article deposited the value whereof exceeds 5*l.*, unless at the time of deposit the true value and nature of the article shall have been declared, and 1*d.* per 1*l.* sterling of the declared value be paid for each day or part of a day in addition to the ordinary cloak-room charges." The plaintiff did not declare the value of the bicycle, which exceeded 5*l.*, at the time of the deposit, and only paid the ordinary cloak-room fee. The bicycle was not put by the defendants' servants in the cloak-room, but was left in the booking hall without protection, and owing to this negligence was stolen :—

Held, that the defendants were protected by the condition, although the bicycle had not been deposited within the cloak-room.

Harris v. Great Western Ry. Co. (1876) 1 Q. B. D. 515 followed.

Decision of the Divisional Court [1920] 3 K. B. 689 affirmed.

APPEAL from the decision of a Divisional Court (Bray and Sankey JJ.). (1)

On September 2, 1919, the plaintiff took his bicycle to the station of the defendants, the Great Eastern Railway Company, at Enfield, for the purpose of depositing it in the cloak-room. He went to the cloak-room, which was also the booking

(1) [1920] 3 K. B. 689.

office, and told the clerk in attendance that he wanted to leave the bicycle. The clerk said that the charge would be 4*d.* and filled up a ticket or receipt for the bicycle. The plaintiff handed 4*d.* to the clerk and the clerk handed the ticket to the plaintiff. The bicycle was then at the open door of the cloak-room or booking office, partly in that apartment, and partly in the public booking hall. The plaintiff asked the clerk if he should bring it into the cloak-room, but the clerk told him to leave it there and he would put it away. The plaintiff then left the bicycle with the clerk and went away.

The ticket consisted of a printed form in which the particulars of the contract in question were inserted in writing. On the face of the ticket there were filled in in writing the name of the station, the date, and the name of the depositor. There was then the printed statement: "Received the undermentioned to be delivered to the person presenting this ticket," followed by a printed list of articles more usually deposited, with spaces opposite them for the charges made—in this instance the space opposite the article "bicycle" having the charge "4*d.*" inserted in it in writing. Then came the following condition printed in legible characters: "The company will not be in any way responsible in respect of any article deposited, the value whereof exceeds 5*l.*, unless at the time of deposit the true value and nature of the article shall have been declared and 1*d.* per 1*l.* sterling of the declared value be paid for each day or part of a day in addition to the ordinary cloak-room charges." Lastly, there was the printed statement: "For further conditions and scale of charges see back of this ticket." On the back of the ticket there was printed matter only consisting of the heading "Conditions upon which articles are accepted for deposit" followed by five numbered conditions. The first of these conditions consisted of a table showing the charges made for articles deposited according to their nature, weight, size and period of deposit; the second condition stated that the company would not be responsible for articles left by passengers at the station unless left in the cloak-room; and the third condition stated that depositors were not

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C. A. permitted access to articles deposited in the cloak-room for
1921 the purpose of securing a portion thereof.

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On the following day, September 3, 1919, the plaintiff returned to the station and went to the cloak-room, where he presented the ticket to the clerk who was then on duty. Search was made for the bicycle but it could not be found in the cloak-room or the bicycle shed, or elsewhere at the station, and it had not since been heard of.

The plaintiff brought the present action against the defendants in the City of London Court claiming 15*l.* 15*s.* as the value of the bicycle, or alternatively 15*l.* damages for negligence.

The plaintiff in his examination-in-chief proved the facts above mentioned as to the deposit of the bicycle at the cloak-room and the issue of the ticket, and he further stated that, on receiving the ticket from the clerk at the cloak-room, he put it in his pocket without reading it; that the clerk did not call his attention to any notice on the ticket; and that he did not know of any condition such as was printed on the face of the ticket or of any reservation of the defendants' liability as to bicycles.

He stated in cross-examination that on former occasions he had left a bicycle at railway cloak-rooms but not at any cloak-room of the defendants; that on these occasions a ticket had always been handed to him, but he had not noticed more thereof than that it was a receipt for the bicycle; that in the present case he noticed that there was printing on the ticket but did not read it, and that he had had a copy of the defendants' time-book but had not seen or read anything about this notice.

At the trial the judge of the City of London Court held that the condition was unreasonable and gave judgment for the plaintiff. The Divisional Court reversed that decision and the plaintiff now appealed.

Schwabe K.C. and *R. Fortune* for the appellant. It is not now contended that the condition is unreasonable. The submission is that the company having themselves broken the

contract by not putting the bicycle into the cloak-room cannot rely upon the condition.

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[LORD STERNDALE M.R. How do you get over *Harris v. Great Western Ry. Co.* (1) ?]

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If it cannot be distinguished, this Court is asked to say that the decision was wrong.

No condition protecting a bailee is applicable where the bailee has acted in breach of his contract : *Davis v. Garrett* (2) ; *Lilley v. Doubleday* (3) ; *Royal Exchange Shipping Co. v. Dixon.* (4)

[LORD STERNDALE M.R. The question is whether there was any breach by the company of their contract. The contract was not to keep the bicycle in the cloak-room.]

They were guilty of negligence in leaving it unguarded. *Harris v. Great Western Ry. Co.* (1) turned on a special form of contract. The decision does not cover this case.

On the question whether the company contracted to keep the bicycle in the cloak-room, it never could have been intended by the parties that the company should be free from all liability whatever their servants might do with it. On the contract there is every indication to the contrary. The ticket speaks of "cloak-room charges," which implies that the bicycle was to be deposited in the cloak-room, or some safe place used as such. *Harris v. Great Western Ry. Co.* (1) is distinguishable, because it was not contemplated there that the articles should be kept in the cloak-room. The reasoning of Lush J. in that case is to be preferred to that of Blackburn J. Here it was directly contemplated that the bicycle should be kept in the cloak-room. The company having broken the contract the plaintiff is not bound by the condition.

Disturnal K.C. and *Bruce Thomas* for the respondents. Railway companies are not bound to provide cloak-rooms. They do so for the convenience of their travellers. There is no contract by the company to keep the bicycle in the cloak-room. It is only a contract to receive at the station,

(1) 1 Q. B. D. 515.

(3) (1881) 7 Q. B. D. 510.

(2) (1830) 6 Bing. 716.

(4) (1886) 12 App. Cas. 11.

C. A. no particular place of deposit being mentioned: *Harris v.*
1921 *Great Western Ry. Co.* (1)

GIBAUD [SCRUTTON L.J. referred to *Travers v. Cooper.* (2)]

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G.E.R. Co. Upon the terms of this contract it is a disavowal of responsibility for any article exceeding the value of 5*l.* unless declared at the time of deposit. *Harris v. Great Western Ry. Co.* (1) has never been doubted or dissented from in the English Courts. Its authority is in no way impaired by *Handon v. Caledonian Ry. Co.* (3)

Schwabe K.C. in reply. In *Handon v. Caledonian Ry. Co.* (3) Lord Shaw preferred the view of Lush J. to that of Mellor J.

LORD STERNDALÉ M.R. This is an appeal from the Divisional Court (Bray and Sankey JJ.), who reversed the decision of the judge of the City of London Court which had been given in favour of the plaintiff in the action. The plaintiff was claiming in respect of the loss of a bicycle which he took to the Enfield Station of the defendants; he gave it to a junior clerk and he asked the junior clerk whether he should take it into the booking office. As at many small stations the booking office was used as the cloak-room of the station; there was no regular cloak-room, as there is at the big termini in London. The junior clerk said "No, it does not matter, leave it where it is," and it was left near the booking office door. From there it must have been stolen, because when the plaintiff came to get it again it was not to be found, and nobody knows anything more about it from that day to this. The defendants relied upon a cloak-room ticket as it is called, which was given to the plaintiff at the time he left the bicycle, which contained this condition: "The Company will not be in any way responsible in respect of any article deposited the value whereof exceeds 5*l.* unless at the time of deposit the true value and nature of the article shall have been declared and 1*d.* per 1*l.* sterling of the declared value be paid for each day or part of a day in addition to the ordinary cloak-room charges. For further Conditions

(1) 1 Q. B. D. 515.

(2) [1915] 1 K. B. 73.

(3) (1880) 7 R. 966.

and Scale of Charges see back of this Ticket." Then there follows a scale of charges for a very large number and a great variety of things, and they include large things like ice-cream carts, street organs, street pianos, side-cars, and various other large things which would not naturally go into the ordinary booking office. Then there followed this condition: "The Company will not be responsible for articles left by Passengers at the Station unless the same be duly registered and a ticket given in exchange. Articles will not be given up unless the ticket issued in respect thereof is surrendered to the Company or alternatively satisfactory evidence of ownership is adduced and a proper indemnity is signed by the claimant. Delivery of any article shall acquit the Company from all further claims in respect of it." Then there followed another condition: "Depositors are not permitted access to any Article deposited in the Cloak Room for the purpose of securing a portion thereof. The Article will only be released as a whole and if re-deposited a further charge will be made and a new Ticket issued in exchange."

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The plaintiff relies upon this contention: he says that the condition requiring the value to be declared of articles above 5*l.* does not apply, and for this reason, that this is a contract to keep in the cloak-room, in this case the booking office, and in that alone. It seems that there was a bicycle shed at the side of the platform where bicycles were kept but that was probably used chiefly for bicycles left just for the day. At any rate there was a bicycle shed which was not the booking office. But the plaintiff's contention is that this condition does not apply at all, because the contract of bailment was to keep in the cloak-room, and if the article were kept somewhere else, then the plaintiff contends that no condition can apply at all, because there was a breach of the contract of bailment. With the principle that is stated there of course I quite agree. That has been laid down in *Lilley v. Doubleday* (1) and also in *Davis v. Garrett* (2), and a number of other cases, and I accept of course the proposition that if a bailee acts in breach of his bailment he cannot rely upon the conditions

(1) 7 Q. B. D. 510.

(2) 6 Bing. 716.

C. A. intended only to protect him in the fulfilment of his duty as
 1921 bailee. But the question is whether that was the contract
 GIBAUD in this case. The learned judge of the City of London Court
 v. and both the judges in the Divisional Court were of opinion
 G.E.R. Co. that this case was governed by *Harris v. Great Western Ry.*
 Lord Sterndale M.R. Co. (1) where the majority of the Court, Mellor and
 Blackburn JJ., although there was a finding of loss by
 negligence, held that the company were protected against
 liability for loss of an article deposited, as this bicycle was
 not in the cloak-room but in another part of the station, and
 they held it on the ground that there was no contract to
 keep necessarily in the cloak-room, but that it was only a
 contract to keep and take reasonable care to keep safely.
 We are asked, first, to distinguish that case, and secondly,
 if we cannot do so, to overrule it. I certainly think there
 is no possibility of distinguishing it in any way in the
 plaintiff's favour. The conditions that I have read seem
 to contemplate, in the case of some articles at any rate
 which are mentioned on the back, that they would not be kept
 in the booking office, because the articles were incapable of
 being kept there, and also the second condition speaks of the
 non-liability not for articles left in the booking office, but
 for articles left at the "Station," unless a ticket is taken for
 them. That seems to me to distinguish the case entirely
 from *Handon v. Caledonian Ry. Co.* (2), because there the
 condition expressly applied, and applied only, on the face of
 it, to articles that were put in the cloak-room or in the
 warehouse, and not to articles which were put not in the
 cloak-room nor in any place that could be called a warehouse.
 Therefore I do not think this case is distinguishable from
Harris v. Great Western Ry. Co. (1), at any rate in favour
 of the plaintiff, and the question is whether we are prepared
 to overrule it, and to overrule it in a case where in my opinion
 the contract is very much more favourable to the defendants
 than it was in that case, and I am not prepared to do so.
 That case has stood for something like forty-five or forty-
 six years. I do not know that it has been referred to with

(1) 1 Q. B. D. 515, 534.

(2) 7 R. 966.

disapproval in any English case on this point ; it has been referred to on another point decided in the case, but certainly there is nothing to show that it has ever been considered not to be good law. But, as I have said, it is enough to say that in this case the contract is much more favourable to the defendants than it is to the plaintiff, and there is much less reason for saying that this was a contract to keep in the cloak-room and nowhere else than there was in *Harris v. Great Western Ry. Co.* (1) I think that the contract here was the contract which was said by Blackburn J. to be the contract in that case. "I read the contract," he says, "as being to keep safely, that is with reasonable and proper care, in any way which to the defendants seemed best, and to deliver up the goods on the production of the ticket if brought at the proper office hours to the cloak-room. I do not think that depositing the luggage in the vestibule would have been any breach of contract, if the defendants had taken reasonable precautions to protect the luggage whilst placed in the vestibule from danger, as, for instance, by leaving a competent person to stand sentry over them till it was convenient to remove them to a more secure place." I think if they had done that the question would not have arisen, because the article would not have gone, but it is not an unfair way of testing what the contract was to ask : Would it have been a breach of contract supposing they had put a sentry to stand over this bicycle instead of leaving it in the vestibule ? If the contract was to deposit in the booking office and nowhere else, that would be a breach, whether any damage followed from it or not. In my opinion it clearly would not be a breach, and therefore I think the plaintiff's contention fails on that ground.

But there is perhaps another ground. It is said : however that may be there is here a finding of the learned judge that the defendants' servants were negligent in the keeping of the bicycle even in the vestibule. I do not think that there is such a finding. Whether the learned judge could have found it is another matter. It is quite true that he uses the expression : "The inference of fact which I draw therefrom

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is that by reason of the lack of due care on the part of the company, consisting in allowing the bicycle to be in the booking hall, it was stolen." I think the whole of that rests on the learned judge's view which he expresses, that if not bound by *Harris v. Great Western Ry. Co.* (1) he would have held that to be a contract to keep in the booking office and, therefore, if that was the contract, then there would be a lack of due care in keeping it anywhere else. I do not think there is any finding that, assuming the contract to be that which I think it is, and that which was said to be the contract by Blackburn J. in the case referred to, the defendants' servants were guilty of negligence. When this condition is looked at, it is that "The Company will not be in any way responsible in respect of any article deposited." They could not be liable except for negligence and, therefore, unless this condition protects them from the negligence of their servants it protects them from nothing. That would be in itself a considerable reason for reading it so as to cover any negligence. But it seems to me there are a great many cases in which words like these have been held to cover any sort of liability. "Howsoever caused" are the words mentioned in *Travers v. Cooper*. (2) The distinction is a thin one. It is so stated by Phillimore L.J. in *Travers v. Cooper*. (3) But it seems to me that the effect of the words "in any way liable" is very much the same as "for anything howsoever caused," and, therefore, from any point of view I think the defendants are protected by this condition, and that the appeal fails and should be dismissed with costs.

SCRUTTON L.J. The appellant took his bicycle to the Enfield station of the Great Eastern Railway Company for deposit and for safe custody. He gave it to the clerk in the booking office. The clerk said "Leave it where it is," and it was left where it was close to the door of the booking office, and when the appellant went for it, it was not to be found. He therefore sued the Great Eastern Railway Company, who pleaded that

(1) 1 Q. B. D. 515.

(2) [1915] 1 K. B. 73.

(3) [1915] 1 K. B. 101.

they were excused from liability by the conditions on the cloak-room ticket. Certain points were argued in the Court below which have not been argued here. An attempt was made to show that the plaintiff was not bound by the conditions on the ticket, or that he was only bound by such conditions on the ticket as were reasonable. These points were not argued here. The point argued here was that the appellant was not bound by the conditions relieving the company from liability, because the company had not kept the bicycle in the place in which they had contracted to keep it. The principle is well known, and perhaps *Lilley v. Doubleday* (1) is the best illustration, that if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it. In *Lilley v. Doubleday* (1) the defendant had contracted to warehouse certain goods at the main warehouse. He warehoused part of them at another place and, without negligence on his part, they were lost from the other place. It was held that though he would have been protected if the goods had been lost without negligence from the place where he contracted to keep them, he lost that protection when he warehoused them in a place where he had not contracted to keep them. *Lilley v. Doubleday* (1) and *Davis v. Garrett* (2) were approved by this Court in *James Morrison & Co. v. Shaw, Savill, & Albion Co.* (3), where it was said by Phillimore L.J. (4) that *Davis v. Garrett* (2) and *Lilley v. Doubleday* (1) laid down the true principle: "As the accident occurred at the time and place when it did, the ship being then on her deviating course, the shipowner is responsible unless he can show that the loss or damage would have occurred if she had been on her proper course

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(1) 7 Q. B. D. 510.

(2) 6 Bing. 716.

(3) [1916] 2 K. B. 783.

(4) [1916] 2 K. B. 800.

C. A. for London." The first question then to be decided is, is
 1921 there a contract on this cloak-room ticket to keep the bicycle
 GIBAUD in any named place, or is the contract merely to keep it with
 v. reasonable care? The contract runs, "Received to be
 G.E.R. Co. delivered to the person presenting this ticket," and though
 Scrutton L.J. "cloak-room" is mentioned twice in the conditions, it is
 never mentioned in connection with the place where the
 thing is to be kept. The only mention of place is at the
 "station." The conditions are described as conditions upon
 which articles are accepted for deposit without stating where.
 The articles themselves that can be kept are of such a nature
 that any one would be very much astonished to find many of
 them in a cloak-room, such as bass viols, bathchairs, harps,
 ice-cream carts, street organs, street pianos, sewing machines,
 side-cars, washing machines, or articles the length, girth
 and width of which together exceed 25 feet. You could not
 put many of them into an ordinary suburban booking office,
 and when one comes to consider the nature of the contract
 as here expressed I entirely agree with the view which
 Blackburn J. in *Harris v. Great Western Ry. Co.* (1) took of
 a contract which was much more favourable to the owner
 of the goods. That learned judge said: "I read the contract
 as being to take reasonable care of the luggage, and to be
 responsible for any loss occasioned by want of care, with,
 in effect, a proviso that, inasmuch as the remuneration is
 very small and the loss may be very great, the defendants
 shall not be responsible for the loss if the goods exceed 5*l.*
 in value, unless the value is declared and paid for." That
 appears to me to be an eminently reasonable clause—that
 is to say, if for the small sum of 2*d.* a responsibility is put
 upon the railway company for keeping an article of con-
 siderable value, the custody of which they are not bound to
 undertake, it is quite reasonable that the company should
 stipulate that if the value exceeds a certain amount, the
 depositor must pay an increased charge, and if he does not
 declare the value and pay for it, they will not be responsible.
 The last point raised is this—I am not sure if it was raised

(1) 1 Q. B. D. 515, 535.

in the Court below, but it has gradually emerged in the course of the case. It is said: There may be a clause exempting the company but it is not a clause exempting them from liability for their own negligence, because the Courts are slow, unless clear words are used, to protect a man from the consequence of his own negligence, or the negligence of his servants. I do not propose to go through the distinctions which have been referred to in this Court in *Travers v. Cooper* (1), because the Court said the distinction is a very fine one, but substantially it comes to this, that though, if you merely enumerate losses without dealing with causes, such a clause may not protect you from your own negligence, if you enumerate causes and suggest you are free from all losses however caused, that will protect you from your own negligence. The words that have been held to give protection are, "Under any circumstances whatsoever," "In any circumstances," "Under any circumstances," or "any injury, however caused." When I read the clause "will not be in any way responsible," and remember that the liability of the company was for negligence—that is to say, they were bound to use reasonable care—it seems to me that those words are clearly sufficient to protect the company, particularly in a case where it is eminently reasonable that they should be protected if the man who deposits property of large value has not taken the trouble to pay the company for the excess in value of the property which he is leaving with them. For these reasons, I think that the appeal should be dismissed.

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YOUNGER L.J. I am of the same opinion.

Solicitors for appellant: *Henry Boustred & Son.*

Solicitor for respondents: *Thomas Chew.*

(1) [1915] 1 K. B. 73.

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LORD HYLTON *v.* HEAL.*Jan. 11.*

Landlord and Tenant—Dwelling House—Recovery of Possession—Lease from Year to Year—Sub-lease—Notice to quit by “tenant”—Notice by immediate Tenant—No Notice by Sub-tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 5, sub-s. 1 (c), sub-s. 5 : s. 12, sub-s. 1 (f) (g) ; s. 15, sub-s. 3.

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5, sub-s. 1 (c), provides in effect that an order or judgment for recovery of possession of a dwelling house to which the Act applies may be made or given where “the tenant has given notice to quit, and in consequence of that notice the landlord has contracted to sell or let the dwelling house or has taken any other steps as a result of which he would, in the opinion of the Court, be seriously prejudiced if he could not obtain possession ; . . . and . . . the Court considers it reasonable to make such an order or give such judgment.”

The tenant from year to year of a dwelling house, to which the above Act applied, duly gave the landlord notice to quit. During the currency of the notice the tenant with the consent of the landlord sub-let the house for the unexpired residue of the tenancy from year to year to a sub-tenant, and the landlord granted a lease of it to a new tenant for a term to commence on the date of the expiration of the tenancy from year to year. The sub-tenant claimed to be a “tenant” within the meaning of the clause above set out, and as he had not given any notice to quit he refused to give up possession of the house on the date above specified. The landlord accordingly brought an action against him under that clause for recovery of possession of the house, in which action the above facts were found and also the fact that the landlord would be seriously prejudiced if he could not obtain possession.

Held, by the Divisional Court, reversing the judgment of the county court judge, that the sub-tenant was not a “tenant” within the meaning of that clause, and that although he had not given notice to quit, the landlord was entitled to an order for possession against him under the clause.

APPEAL from Frome County Court.

In September, 1918, the plaintiff, Lord Hylton, let to Mrs. Besley a dwelling house with buildings and ground thereto belonging in the parish of Kilmersdon, Somersetshire, on a tenancy from year to year at the yearly rent of 40*l.*, the tenant covenanting not to assign or underlet without the consent of the plaintiff. Such consent, however, not to be unreasonably withheld to a respectable and responsible person. In July, 1919, Mrs. Besley gave notice to quit on

March 25, 1920, and that notice was accepted on behalf of the plaintiff by his agent.

On August 2, 1919, Mrs. Besley, with the consent of the plaintiff, sub-let the premises to the defendant, Heal, from September 29, 1919, for the residue of her own tenancy to March 25, 1920. Negotiations then took place between the defendant and the plaintiff's agent with a view to the granting of a lease of the premises by the plaintiff to the defendant, but although these negotiations continued till October, 1919, they came to nothing. On November 9, 1919, the plaintiff let the premises to one Monk for a term of seven years from March 25, 1920. The defendant refused to give up possession of the premises on the last-mentioned date, and Monk commenced proceedings against the plaintiff for damages and specific performance. In May, 1920, the plaintiff accordingly brought an action against the defendant in the county court under the Increase of Rent Acts then in force for possession and mesne profits, in which action on June 15, 1920, judgment was given for the defendant on the grounds that in the circumstances he was a "tenant" within the meaning of the Act of 1919, and that the facts did not bring the case within any of the conditions on which an ejectment order could be made under that Act.

On July 2, 1920, the Increase of Rent, &c. (Restrictions), Act, 1920, was passed, and the earlier Increase of Rent Acts were thereby repealed. In August, 1920, the plaintiff brought a second action against the defendant in the county court under the new Act for possession and mesne profits. The defendant gave notice of his intention to rely by way of defence upon the Act of 1920, and particularly upon ss. 5, 15, and 19 thereof. (1)

In this action the county court judge gave judgment for

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 :—

Sect. 5: "(1.) No order or judgment for the recovery of possession of any dwelling house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless (c) the tenant has given notice to quit, and in

consequence of that notice the landlord has contracted to sell or let the dwelling house or has taken any other steps as a result of which he would, in the opinion of the Court, be seriously prejudiced if he could not obtain possession; . . . and, in any such case as aforesaid, the Court considers it reasonable to

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the defendant on the grounds that in the interpretation clause of the Act, s. 12, sub-s. 1 (1), he found that "tenant" was defined as the original tenant or any person deriving title from the original tenant, that the defendant derived title from the original tenant, that when the action was brought Mrs. Besley, the original tenant, had ceased to be tenant to the plaintiff, and the defendant, the sub-tenant, was statutory tenant to the plaintiff under the Act, and that the defendant not having given notice to quit, the plaintiff's cause of action under s. 5, sub-s. 1 (c) (1), failed. In case on appeal the higher Court should hold that he was wrong, the judge found that in consequence of the notice to quit given by Mrs. Besley the plaintiff had let the house to Monk, and would in his (his Honour's) opinion be seriously prejudiced if he could not obtain possession.

Schiller K.C. (*H. G. Robertson* with him) for the plaintiff, appellant. The plaintiff is entitled under s. 5, sub-s. 1 (c) (1), of the Increase of Rent, &c. (Restrictions), Act, 1920, to an order that the defendant deliver up possession of the house, make such an order or give such judgment."

"(5.) An order or judgment against a tenant for the recovery of possession of any dwelling house or ejectment therefrom under this section shall not affect the right of any sub-tenant to whom the premises or any part thereof have been lawfully sub-let before proceedings for recovery of possession or ejectment were commenced, to retain possession under this section, or be in any way operative against any such sub-tenant."

Sect. 12: "(1.) For the purposes of this Act, except where the context otherwise requires:—

"(f) The expressions
'tenant' include any
person from time to time
deriving title under the
original landlord, tenant....;

"(g) the expressions 'tenant and tenancy' include sub-tenant and sub-tenancy; and the expression 'let' includes sub-let; and the expression 'tenant' includes the widow of a tenant dying intestate who was residing with him at the time of his death...."

Sect. 15: "(3.) Where the interest of the tenant of a dwelling house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

(1) See note (1) ante, p. 439.

and to mesne profits. The facts of the case as proved and found at the trial bring it completely within that clause. At the time when Mrs. Besley gave notice to quit to the plaintiff she was the "tenant" of the house within the meaning of that clause and the proper person to give the notice thereunder, and it was not necessary, in order to entitle the plaintiff to maintain the action, that notice should also have been given by the defendant, the sub-tenant. Sect. 12, sub-s. 1, clauses (f) and (g) (1), no doubt define "tenant" for the purposes of the Act as including a person deriving title under the original tenant, a sub-tenant, and certain other persons, but that definition is subject to the express qualification "except where the context otherwise requires." In many of the provisions of the Act, however, the context requires that the term should receive a narrower meaning than that of the definition. One of these is s. 5, sub-s. 1 (c) (1), the clause in question, which in providing for the making of an order for possession where "the tenant has given notice to quit" plainly contemplates the original or other immediate tenant of the landlord, while his tenancy continues, as the only tenant who can give the landlord notice to quit. As soon as the original tenant's notice to quit has expired the landlord's right to possession accrues, and in the absence of any special reason to the contrary he is entitled to take proceedings against the person whom he finds in occupation whether that person be the original tenant or a sub-tenant. If the county court judge is right in holding that "tenant" as used in clause (c) includes a sub-tenant, then the landlord could never recover possession of the premises under that clause in any case in which they had been sub-let. Even if in that clause the term tenant includes a sub-tenant or other person who may have become a statutory tenant of the landlord, that does not imply that for the purpose of giving notice to quit the statutory tenant is to be substituted for the original tenant, and that where notice has been duly given by the original tenant, a further notice must be given by the person who becomes statutory tenant.

(1) See note (1) ante, p. 439.

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The defendant will probably place reliance upon s. 5, sub-s. 5 (1), which provides that an order or judgment against a tenant for the recovery of possession of any dwelling house under the section shall not affect the right of any sub-tenant to whom the premises have been sub-let before proceedings for possession were commenced. That sub-section, however, is by its terms limited to the case in which an order for possession has been made against the immediate tenant, and it cannot therefore have any application to the present case, and moreover it does not either expressly or by implication provide that the landlord cannot commence separate proceedings for possession against the sub-tenant. The defendant may also rely upon s. 15, sub-s. 3 (1), which provides that where the interest of a tenant is determined, any sub-tenant shall, subject to the provisions of the Act, be deemed to become a tenant of the landlord; thus making the sub-tenant a statutory tenant of the landlord. That sub-section would, however, be wholly unnecessary if the view of the defendant were right that the term "tenant" in every case includes a sub-tenant, and the fact that it is included in the Act tends to show that in certain of the provisions of the Act, such as s. 5, sub-s. 1 (c) (1), the term does not include a sub-tenant. Further, s. 15, sub-s. 3 (1), only provides that the sub-tenant shall be deemed to become the tenant "subject to the provisions of this Act," and subject to the provisions of the Act the term "tenant" in s. 5, sub-s. 1 (c) (1), does not include a sub-tenant, and where the requirements of that clause are complied with the landlord is entitled to an order for possession thereunder notwithstanding that a sub-tenant is in occupation.

The tenancy which the plaintiff granted to his original tenant has come to an end, the defendant has not become a statutory tenant of the plaintiff under the Act and is not lawfully in possession of the house, and the plaintiff is therefore entitled to an order against him for recovery of possession of the house.

(1) See note (1) ante, p. 439.

R. P. Croom-Johnson for the defendant, respondent. The decision of the county court judge was right, and the plaintiff is not entitled either to an order or judgment for possession under s. 5, sub-s. 1 (c), of the Act of 1920 (1), or to a new trial.

Under the repealed Increase of Rent, &c. (War Restrictions), Act, 1915, s. 1, sub-s. 3, as amended by the later repealed Acts, an order for recovery of possession of a dwelling house to which these Acts applied might be made on certain special grounds and also on any other ground that might be deemed satisfactory to the Court; but it was held that the general discretion so conferred upon the Court could not be exercised on a ground which was inconsistent with the specified grounds: see *Stovin v. Fairbrass* (2) and *Green-Price v. Webb*. (3) Sect. 5, sub-s. 1, of the Act of 1920 gives effect to the principle of these cases by providing that an order for possession shall only be made in the cases specified in the various clauses of that sub-section. To be entitled to an order for possession under that sub-section the landlord must show the definite grounds mentioned in one or other of its clauses. The plaintiff brought the present action against the defendant under clause (c) of that sub-section, which provides in effect that an order for recovery of possession of a dwelling house to which the Act applies may be made where the tenant has given notice to quit, and in consequence thereof the landlord has contracted to sell or let the house. In that clause the term "tenant" includes any person deriving title under the original tenant, and any sub-tenant; as appears from the definition of the term in s. 12, sub-s. 1 (f) and (g). At all events, in that clause the term "tenant" includes a sub-tenant where the interest of the tenant has come to an end; as appears from s. 15, sub-s. 3, which provides that "where the interest of a tenant is determined any sub-tenant to whom the premises have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy

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(1) See note (1) ante, p. 439.

[1919] W. N. 216.

(2) (1919) 88 L. J. (K. B.) 1004;

(3) [1919] W. N. 261.

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had continued," and thus makes the sub-tenant a statutory tenant of the landlord. If the term "tenant" in clause (c) includes a sub-tenant, the defendant is a tenant within the meaning of the clause, and as he has never given notice to quit, it follows that the plaintiff cannot recover against him under the clause. The view that "tenant" in clause (c) includes a sub-tenant, is in keeping with its meaning in clauses (a) and (b) of the same sub-section, in both of which it must be taken to include a sub-tenant, at least where he has become a statutory tenant. Sect. 5, sub-s. 5, which provides that an order or judgment against a tenant for possession shall not affect the right of any sub-tenant to whom the premises have been sub-let before the proceedings, implies that an order which might have been obtained against the original tenant on any grounds ought not to be obtained against the sub-tenant on the same grounds, and therefore prevents the maintaining of the present action.

The landlord is only entitled to an order for possession under any of the clauses of s. 5, sub-s. 1, including clause (c), if the Court considers it reasonable to make such an order, and, consequently, even if this Court should be of opinion that "tenant" in clause (c) does not include a sub-tenant, and that it is not necessary that the landlord should receive notice to quit from the sub-tenant in order to entitle him to recover possession, yet the plaintiff would not be entitled to judgment but only to a new trial, for the county court judge has not yet found whether or not he considers it reasonable that an order for possession should be made.

Schiller K.C. replied.

ROWLATT J. In this case the plaintiff, Lord Hylton, let a house at Kilmersdon in Somersetshire to a Mrs. Besley on a tenancy from year to year. In July, 1919, she gave notice to quit on March 25, 1920. In the meantime, before the expiration of the notice she had sub-let the house to the defendant, Heal, and the plaintiff had relet it to a new tenant as from the last-mentioned date. The defendant now declines to go out, and the plaintiff is faced with a claim by his new

tenant for failing to give him possession of the premises. In those circumstances it was contended for the plaintiff that he was entitled to an order for possession under s. 5, sub-s. 1 (c), of the Increase of Rent, &c. (Restrictions), Act, 1920 (1), on the ground that the case was one which came within the words of that clause: "the tenant has given notice to quit, and in consequence of that notice the landlord has contracted to sell or let the dwelling house or has taken any other steps as a result of which he would, in the opinion of the Court, be seriously prejudiced if he could not obtain possession." The county court judge has found the facts necessary to bring the case within the latter part of that clause; and if it was clear that the case was one in which notice to quit had been given by the "tenant" within the meaning of the clause, there can be no doubt that the clause would apply.

It is, however, provided by the definition section of the Act, s. 12, sub-s. 1 (f) and (g) (1), that, except where the context otherwise requires, "tenant" includes any person deriving title under the original tenant, and also a sub-tenant, and in certain cases the widow of a tenant or some other member of his family; and the county court judge has held that, inasmuch as the term "tenant" is so defined in the Act, it applies to the present defendant, who, although he is a sub-tenant, must be looked upon as the tenant of the plaintiff for the purposes of the clause in question. In that view I cannot concur.

In my opinion the term "tenant" in s. 5, sub-s. 1 (c) (1), means the immediate tenant of the landlord, because he is the only person to whom the clause can apply. To explain my meaning with greater fullness and accuracy I may say that, having regard to the definition, I think that the term "tenant" as used in the Act is *prima facie* a generic term including the original tenant, a person deriving title under him, a sub-tenant, or any one else who comes within the definition, but that it is only used in that wide sense where the context does not otherwise require. It seems to me that in s. 5, sub-s. 1 (c), the context requires that the term should

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(1) See note (1) ante, p. 439.

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be used in a narrower sense. Inasmuch as that clause contemplates the case where the tenant has given notice to quit and the only tenant who can give notice to quit is the original and immediate tenant of the landlord, it follows, owing to the limitations imposed by the clause and the facts which it implies, that "tenant" as there used must mean the original tenant of the landlord. If that were not so many curious results would follow. The landlord, who is intended to be protected by this clause, although he had received notice to quit from his original tenant and had re-let the premises to another tenant, could nevertheless be deprived of the benefit of the clause by the tenant who had given notice himself sub-letting the premises at any time up to the last moment of his term.

While I recognize that throughout the Act the term "tenant" is generally speaking to be taken to include both an original tenant and a sub-tenant, as the definition states, so as to represent any interest on the side of the bargain opposed to that of the landlord, I think that there are certain provisions in the Act, other than the clause in question, in which the context requires that the term be understood in a more restricted sense. Take, for example, clause (a) of s. 5, sub-s. 1, the sub-section now under consideration, which provides in effect that an order for recovery of possession of a house may be made where "any rent lawfully due from the tenant has not been paid." Can it be said that "tenant" there includes a sub-tenant, and that where a landlord has not been paid rent by his tenant, perhaps for years, and has given him notice to quit, the tenant at the last moment of his tenancy can prevent the landlord from recovering by sub-letting to another person from whom no rent is as yet due? Or take clause (b) under which an order for recovery of possession may be made where the tenant has been guilty of conduct which is a nuisance or has allowed the premises to deteriorate by his neglect. Can it be said that where the original tenant has been guilty of conduct of that kind an order for recovery of possession cannot be made under that clause because the tenant has

sub-let the premises to another person? Or take clause (d), under which an order for possession may be made where the house is reasonably required by the landlord for occupation as a residence for himself or certain other persons, and the Court is satisfied that alternative accommodation reasonably equivalent is available; and, along with that clause, the provision at the end of the sub-section in which it is contained, that "the existence of alternative accommodation shall not be a condition of an order or judgment," except in certain cases—namely (*inter alia*), "(i.) where the tenant was in the employment of the landlord . . . and the dwelling house was let to him in consequence of that employment and he has ceased to be in that employment." It is plain that the intention of that provision is that where a landlord has let a house to a tenant who was, but has ceased to be, in his employment, the landlord, if the house is reasonably required by him as a residence, may recover possession of it, although alternative accommodation for the tenant is not available. According to the definition the term "tenant" may include the widow of a tenant dying intestate, but where the tenant who was in the employment of the landlord has died intestate leaving a widow could it be said that his widow was the "tenant" within the meaning of the provision to which I have just referred, and that as she had not herself been in the employment of the landlord, an order for possession could not be made against her unless alternative accommodation was available? That provision cannot be supposed to apply to the case in which the widow of the employee has become the tenant. If it were applied to that case the landlord would be deprived of the protection which the Act recognizes that he should have, not because of any demerit of the particular occupant, but because of the purpose for which the house was let having come to an end by reason of the workman having ceased to be in the landlord's employment. Similarly, the clause now in question, clause (c) (1), must, I think, be taken to recognize that it is essential to the protection of the landlord, who has received

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notice to quit from his immediate tenant, and in consequence thereof has contracted to let the house to another person, that he should be entitled to recover possession of the house ; and if it were held that, in the case where the house was sub-let, the landlord could not recover possession unless he received notice from the sub-tenant also, he would in that case be deprived of the protection of that clause.

It seems to me that in all these cases the protection is given to the landlord because of his position in relation to the circumstances, and is in no way affected by the consideration that the particular person who happens to be in occupation of the premises, and against whom the ejectment proceedings are taken, is not the original tenant, but some other person who is a statutory tenant.

As opposed to these clauses there are certainly some other provisions of the Act which might at first sight seem to be inconsistent with them and which were pressed upon us with clearness and force by counsel for the defendant ; but on consideration I do not think they are opposed to the construction which I have indicated. One of these provisions is s. 5, sub-s. 5. (1) [His Lordship read that sub-section and continued :] Counsel for the plaintiff is of course right in saying that that sub-section does not apply to this case, because there is here no order or judgment against the tenant which it is sought to use against the sub-tenant. It does, however, raise a question as to the general construction of the Act, which requires to be noticed. It provides that an order or judgment against a tenant in an action for possession of a house shall not affect the right of a sub-tenant to retain possession, and, that being so, it is said that it would be odd if in an action against the sub-tenant, in which the landlord alleged precisely the same facts as he would have alleged in an action against the tenant, an order or judgment should affect the sub-tenant. I do not think that that is an argument of great weight. It seems to me that as the Act does to some extent recognize that the sub-tenant has a substantive position as against the landlord, it was necessary that it should contain a provision such as this to ensure that

proceedings by the landlord against the head-tenant shall be immaterial as against the sub-tenant. In my view this sub-section only means that where there is a sub-tenant lawfully and de facto in possession of the house, the landlord who desires to recover possession cannot avail himself as against the sub-tenant of any order or judgment which he may have recovered against the tenant, but must commence separate proceedings against the sub-tenant, in which the latter can urge whatever matters he may think fit, including matters personal as between himself and the landlord affecting the reasonableness of the landlord's demand, which is one of the elements to be taken into account in the proceedings. That, I think, is the purpose to which this sub-section is limited. Another provision of the Act upon which counsel for the defendant relied is s. 15, sub-s. 3. (1) [His Lordship read that sub-section.] I think that that sub-section merely means that where the interest of the original tenant has been lawfully determined, then any sub-tenant, assuming that he is entitled to retain possession under the provisions of the Act, shall, notwithstanding that the title under which he derived his interest has come to an end, continue to be tenant, the terms on which he retains possession being the same as those on which he would have held from the tenant if the tenancy had continued.

For these reasons I think that the judgment under appeal should be set aside, and that the plaintiff is entitled to judgment with costs.

BAILHACHE J. I am of the same opinion. I have never entertained any doubt that in this case the "tenant" by whom notice to quit should have been given under s. 5, sub-s. 1 (c), was Mrs. Besley, the original tenant of the plaintiff, and not the defendant, Mr. Heal, the sub-tenant.

Any difficulty I have found has arisen from s. 5, sub-s. 5 (1), and s. 15, sub-s. 3 (1), two provisions which were strongly relied upon by counsel for the defendant.

Sect. 5, sub-s. 5 (1), provides in effect that an order or

(1) See note (1) ante, p. 439.

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judgment against a tenant for possession of a dwelling house shall not be operative against the sub-tenant. When the case was opened I was much impressed by the support which that provision appeared to give to the defendant's case. It seemed to me to be odd that, if an order or judgment against a tenant was not to be operative against a sub-tenant, yet the same grounds upon which that order or judgment would have been obtained might be made the subject-matter of a separate action against the sub-tenant in which the order or judgment when pronounced would be operative as against him. I think, however, the point is completely met by the answer that has been given to it by counsel for the plaintiff, and has since been repeated by my Lord.

As to s. 15, sub-s. 3 (1), that sub-section would I think have been an insuperable bar to the success of this appeal but for the fact that it provides that the sub-tenant shall "subject to the provisions of this Act" be deemed to become the tenant. These words, however, prevent it from being a serious objection. The conclusion at which my Lord has arrived as to the meaning of that sub-section is, I think, the true one—namely, that one has to consider what rights the sub-tenant would have under the provisions of the Act. If under the Act the sub-tenant has a right to continue to be a sub-tenant, or has other rights, then these rights are preserved to him by the sub-section; but if he has no such rights and, if s. 5, sub-s. 1 (c), is the provision which is applicable to his case, then s. 15, sub-s. 3, does not assist him.

On the whole, although I think that the case is not free from difficulty, I have come to the conclusion that the judgment of the learned county court judge was wrong, and that the appeal should be allowed and judgment entered for the plaintiff with costs.

Appeal allowed. Judgment for plaintiff.

Solicitors for appellant : *Withers, Bensons, Currie, Williams & Co., for E. G. Ames & Son, Frome.*

Solicitors for respondent : *Calder Woods & Pethick, for Wansbroughs, Robinson, Tayler & Taylor, Bristol.*

J. R.

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March 2, 10.

[1920. G. 2391.]

Landlord and Tenant—Standard Rent—Licensed Premises—Sublet with Tied Covenant at reduced Rent—Right of Landlords to increase Rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), ss. 3, 12, 15.

In August, 1911, a public-house was let to a brewery company upon a lease for five years at a rent of 130*l.* per annum. The lease contained no covenant as to purchase of liquors. In October, 1911, the brewery company sublet the premises to the defendant under an agreement containing the usual "tied house" clause upon a quarterly tenancy at the rent of 40*l.* per annum. The rent was subsequently reduced to 24*l.* a year, which was the rent in force on August 3, 1914. In August, 1916, the lease of the brewery company came to an end and was not renewed. The defendant then became tenant to the plaintiffs, who were the owners. In February, 1918, the defendant by a written agreement agreed to take the premises at a rent of 30*l.* per annum. By the agreement either party might determine the tenancy by a quarter's notice to quit, the tenant agreed to use the premises as a public-house only, and the landlord might re-enter for breach of the agreement. On March 23, 1920, the plaintiff gave the defendant notice to quit on June 24, 1920, and also gave him notice that if he held over after that date his rent would be 130*l.* per annum, alleging that that was the standard rent of the premises in 1914. The defendant remained in possession and tendered rent at the rate of 30*l.* per annum, but he refused to pay rent at the rate of 130*l.* per annum. The rateable value of the premises was 24*l.* 16*s.* The plaintiffs claimed to recover possession of the premises on the ground of the defendant's breach of obligation to pay rent at 130*l.* per annum:—

Held, that it could not be assumed from the mere fact that a tenant remained in possession of premises after receiving notice from the landlord of increase of rent that the tenant assented to the increase of rent, and that the defendant never in fact assented to the increase of his rent to 130*l.* Secondly, that in deciding what the standard rent of the premises was, only the rent paid by the occupying tenant on August 3, 1914, could be taken into consideration, namely 24*l.*, notwithstanding that that rent was a "tied-house" rent, and that there could not be added to that sum an amount which represented the larger sum which might have been payable if no tie existed.

ACTION tried by McCardie J.

The following statement of facts is taken from the judgment.

"The plaintiffs, as legal mortgagees, are for the purposes of the case to be treated as the owners of a public-house

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known as the 'King's Arms,' Crich, in the County of Derby. They seek to recover possession of the premises from the defendant who is now in occupation. The facts are not in dispute. They can be briefly stated.

"In August, 1911, the plaintiffs' predecessors in title let the public-house to the Chesterfield Brewery Co., Ltd., upon a lease for five years. The lease contained no covenants as to the purchase of liquors. The rent was 130*l.* per annum.

"In October, 1911, the Brewery Company sublet the premises to the defendant upon a quarterly tenancy at the rent of 40*l.* per annum. The agreement contained the usual 'tied-house' clause for the purchase of liquors by the defendant from the Brewery Company. The rent of 40*l.* was, by a later agreement, reduced to 24*l.* a year, and on August 3, 1914, this reduced rent was in force. Later on the rent was further reduced to 15*l.* per annum.

"In August, 1916, the lease of the Brewery Company ended. They did not renew it. The defendant then became tenant to the plaintiffs at the said rent of 15*l.* until February, 1918, when a written agreement was entered into whereby the defendant became a quarterly tenant of the plaintiffs at the rent of 30*l.* per annum. This agreement of February, 1918, contained clauses whereby (*inter alia*) (1.) Either party might determine the tenancy by a quarter's notice to quit; (2.) the tenant agreed to use the premises as a public-house only; (3.) the landlords might re-enter for breach of agreement, as, for example, non-payment of rent.

"On March 23, 1920, the plaintiffs duly gave the defendant notice to quit on June 24, 1920. By letter dated March 23, 1920, the plaintiffs also gave notice to the defendant that 'if you hold over after that date (*i.e.*, June 24, 1920) under the special provisions still in force your rent from that date will be at the rate of 130*l.* per annum, being the amount payable in respect of the premises in 1914.' 'The special provisions' referred to were, of course, the Rent Restrictions Acts.

"On June 2, 1920, the defendant's solicitors wrote: 'Perhaps you will be good enough to let us know your authority

for threatening to charge our client a rental of 130*l.* if he remains in possession after 24th June next.'

"On June 11, 1920, the plaintiffs replied: 'The notice given to your client was to pay as from the 24th June the standard rent for the premises as in 1914. It may be that under the Rent Restriction Act that is about to be passed that a further increase will be permissible, but the position of the premises under that Act will be considered in due course.' I may mention that the Rent Restriction Act of 1920 was passed on July 2.

"On June 12 the defendant's solicitors wrote: 'By what authority do you demand from our client the rent payable in 1914?'

"On June 16 the plaintiffs wrote: 'Our authority to demand from your client the standard rent is as mortgagees in possession.'

"On June 23 the defendant's solicitors replied: 'We were already aware that you were mortgagees in possession. What we want to know is by what statute or otherwise you claim to demand a rental of 130*l.* in the event of our client holding over?'

"On June 24, 1920, the plaintiffs answered: 'We claim to be entitled to increase the rent to 130*l.* per annum, that being the standard rent on the 3rd August, 1914, as provided by the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915.'

"This ends the material correspondence. The defendant remained in possession under the Rent Restrictions Acts. He has always refused to pay rent at 130*l.* a year. He has admittedly tendered rent at the proper time at the rate of 30*l.* a year, and he has protested against any greater liability.

"On November 6 the plaintiffs issued their writ claiming possession of the 'King's Arms' on the ground of the defendant's breach of obligation to pay rent at the rate of 130*l.* per annum. They also claim 32*l.* 10*s.*, being one quarter's rent at 130*l.* a year alleged to have accrued on September 29, 1920."

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The rateable value of the licensed premises at all material times was 24*l.* 16*s.* only.

P. E. Sandlands for the plaintiffs.

Ralph Thomas for the defendant.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

March 10. MCCARDIE J. read the following judgment : This action raises difficult points of practical importance on the law of landlord and tenant, and as to the effect of the Rent Restrictions Acts. [His Lordship stated the facts set out above and continued:] I need only add one important circumstance—namely, that the rateable value of the said licensed house has been at all material times and still is the sum of 24*l.* 16*s.* only. This brought the premises within s. 2 of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, which provides by sub-s. 2 of s. 2 that : “ This Act shall apply to a house or a part of a house . . . where either the annual amount of the standard rent or the rateable value of the house or part of the house does not exceed—(a) in the case of a house situate in the metropolitan police district, including therein the City of London, 35*l.* ; (b) in the case of a house situate in Scotland, 30*l.* ; and (c) in the case of a house situate elsewhere, 26*l.* ” The same fact brings the public-house within the existing Rent Restrictions Act, 1920 : see s. 12, sub-s. 2, thereof. It is convenient at this point to cite the material part of an important clause of this last-named Act of 1920—namely, s. 12, sub-s. 1, which provides : “ For the purposes of this Act, except where the context otherwise requires :—(a) The expression ‘ standard rent ’ means the rent at which the dwelling house was let on the 3rd day of August, 1914, or, where the dwelling house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling house which was first let after the said 3rd day of August, the rent at which it was first let.” This is a reproduction of s. 2, sub-s. 1 (a),

of the Act of 1915. I may state that this public-house must be deemed to be a dwelling house within the Increase of Rent (Restrictions) Acts, 1915-1919: see *Epsom Grand Stand Association v. Clarke*. (1) It must also be deemed to be a dwelling house within the present Increase of Rent (Restrictions) Act, 1920: see s. 12, sub-s. 2, proviso (ii.), and *Waller v. Thomas*. (2)

Now it is clear that on June 24, 1920, the defendant's ordinary common law tenancy came to an end. He thenceforward became what may be called a "statutory tenant." He clearly and admittedly remained in possession in reliance on the Increase of Rent (Restrictions) Acts.

The Act of 1920 provides by s. 15, sub-s. 1: "A tenant who by virtue of the provisions of this Act retains possession of any dwelling house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession of the dwelling house only on giving such notice as would have been required under the original contract of tenancy, or, if no notice would have been so required, on giving not less than three months' notice." This section was considered by the Court of Appeal in *Remon v. City of London Co.* (3) In that case Scrutton L.J. said (4): "The object of the various Rent Restrictions Acts is clear. It was intended to prevent the tenant from having his rent raised against him, or from being turned out, though his tenancy by agreement had expired, so long as he was willing to pay the rent authorised by statute." It is well to mention s. 3 of the Act of 1920, which provides in sub-s. 1: "Nothing in this Act shall be taken to authorise any increase of rent except in respect of a period during which but for this Act the landlord would be entitled to obtain possession." This section, although contained in an Act of Parliament passed after the plaintiffs had

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(1) [1919] W. N. 170; 35 Times
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(2) [1921] 1 K. B. 541.

(3) [1921] 1 K. B. 49.

(4) *Ibid.* 57.

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given notice to the defendant demanding an increased rent, illustrates and recognizes the basic rule which appears to underlie the earlier Acts as well as the existing Act—namely, that a landlord cannot increase rent merely by giving notice to the tenant that he requires an increased rent. He must first, I think, determine the existing tenancy before he can impose any increase on the tenant: see *Connolly v. Whelan* (1), per Samuels J. No increase can exceed the standard rent plus any permitted addition: see s. 1 of the Act of 1915, and s. 1 of the Act of 1920.

In the present case the tenancy of the defendant was duly determined, and the question thus arises as to whether a permissible increase can be imposed after a tenancy by agreement is ended (a) only with the assent of the tenant, or (b) apart from assent and in pursuance of statutory powers contained in the Rent Restrictions Acts. It is to be noted that s. 2 of the Act of 1920 (reproducing in substance the provisions of s. 1 of the Act of 1915) gives no express power to the landlord to impose in invitum an increase of rent on the tenant who remains in possession in reliance on the Rent Restrictions Acts. It refers to "permitted increases." But upon the whole I think that the Acts impliedly give the landlord power to make the permitted increases as against the tenant (who holds over as a statutory tenant), even though such statutory tenant does not assent thereto: see *Cork Improved Dwellings Company v. Barry* (2) (a decision on the earlier Rent Restrictions Acts). Before, however, he can impose such permitted increases in such a case the landlord must comply with the conditions precedent imposed by the Acts: see s. 1, sub-s. 1, proviso (vi.) of the Act of 1915 and s. 3, sub-s. 2, of the Act of 1920. I will further deal with this point later. It must be remembered that a tenant who, after a landlord's notice to quit, holds over in reliance on the Rent Restrictions Acts is not liable for double value inasmuch as he acts upon a claim of right and not contumaciously: see *Crook v. Whitbread*. (3) Nor is he liable in such a

(1) (1919) 54 Ir. L. T. 18.

(2) [1919] 2 I. R. 244.

(3) [1919] W. N. 185.

case to an ordinary action for use and occupation : see the same authority.

I deem it to be reasonably clear (so far as anything may be said to be clear upon this complicated legislation) that a tenant who holds over under the Acts may assent to the permissible increase and become contractually bound in respect thereof. Such assent would not be a contracting outside the provisions of the Act but would be a contract within the provisions of the Act, and therefore the point as to freedom of contract which was discussed in *Barton v. Fincham* (1) would not arise. Now the assent may, I suppose, be given (a) either in writing, or (b) by parol, apart from any question of the Statute of Frauds, or (c) by conduct.

It is argued that here the tenant assented to the increased rent of 130*l.* by remaining in possession after the notice by the landlord. I am unable to agree with this argument. Two authorities, both cited in Mr. Foà's excellent work on *Landlord and Tenant*, 5th ed., at p. 736, were cited to me. The first decision was *Roberts v. Hayward* (2), tried before Best C.J. in 1828. There the landlord in giving a notice to quit required the tenant to pay an increased rent if he continued in possession, and added : " If you continue to occupy after that day, you will be considered by me as agreeing to pay that rent." The tenant continued in possession. He made no protest against the notice. He was absolutely silent. Best C.J. held that under the circumstances the tenant was bound to pay the increased rent. In my opinion, Best C.J. did not lay down any general rule of law. I think he merely held that upon the facts of the case the tenant assented to the new terms proposed by the landlord. The second case cited was the Scotch case of *M'Farlane v. Mitchell*. (3) There the landlord, apparently without giving any notice to quit, wrote to the tenant that if he remained in possession his rent would be increased. The tenant protested and said he would not agree. The landlord then wrote that his former letter contained the conditions upon which the tenant would

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(1) Ante p. 291 ; 137 Times L. R. 386.

(2) (1828) 3 C. & P. 432.

(3) (1900) 2 F. 901.

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occupy the shop for the coming year. The tenant, without further protest, remained in possession. It was held by the Court of Session that the tenant was bound to pay the higher rent. In my view this was a finding of fact by the Court—namely, that the tenant must be deemed, under the circumstances, to have agreed to pay the higher rent. As Lord Moncrieff put it (1): “What is the fair inference? I think that the reasonable inference is that he agreed to the landlord’s terms, and that he is now bound by them.” In any event, this decision was one given upon a system of law substantially different to that prevailing in England upon the relationship of landlord and tenant. In the action now before me it is reasonably clear that the defendant never assented to the plaintiffs’ claim to an increased rent. On the contrary, I think that the effect of the letters is that he was strongly though impliedly protesting against the proposed increase. I find as a fact that the defendant never agreed that the rent should be increased to 130%.

This being so, the question arises whether the plaintiffs’ notice of March 23, 1920, operates to secure them the increased rent apart from any assent by the tenant. Neither the Act of 1915 (see s. 1) nor the Act of 1920 (see s. 2) appear to deal with such a case as that before me. The actually contemplated increases seem to be confined to such matters as expenditure on or improvement of the house, or an increase of rates, or fixed percentage rent increase. But as Bankes L.J. said in *Remon’s Case* (2): “the Court must endeavour to place a reasonable interpretation upon the statute, if the language used admits of such an interpretation.” Now the Acts appear to assume that although a landlord cannot raise the rent of a house above the standard rent, plus the permitted increases, yet he may at any time raise to a standard rent a rent which previously had been below the standard rent. There is nothing, so far as I can see, to prohibit such a course provided that due notice to determine a tenancy is given. Save as forbidden by the Act the ordinary powers of a landlord appear to remain. If therefore a landlord after due notice of claim

(1) (1900) 2 F. 904.

(2) [1921] 1 K. B. 55.

and after the expiration of the common law tenancy demands the standard rent from the statutory tenant, then I think that the tenant must be held liable in law to the higher rent. I see no other way of reconciling the statutory provisions with common law obligations. The clauses relating to the form of notice with respect to the permitted increases, as, for example, for increased rates, do not appear to deal with such a case as that before me : see s. 1, sub-s. 1, proviso (vi.) of the Act of 1915 and s. 3, sub-s. 2, of the Act of 1920. Here the landlord's notice did not and could not comply with the forms required by the last cited provisions.

Now assuming that the landlord was entitled as against the tenant to the standard rent as from June 24, 1920, the question arises, a question indeed which is involved in the points previously dealt with, as to what is the standard rent of the public-house in question. Upon the whole I come to the conclusion that the rent to be considered in each case must be the rent paid by the occupying tenant on August 3, 1914. Here that rent was 24*l.* only. It is true that such rent was a "tied-house" rent. But it was in fact the "rent" agreed and payable. It was the only rent which could be sued for or distrained for. I do not think that I am entitled to add to that sum an amount which represents the larger sum which might have been payable had no tie existed. That would be a collateral consideration which I must reject. Such seems to be the principle of the decision of Bray J. in *Westminster and General Properties and Investment Co. v. Simmons*. (1) He there held that the fact that a lessor agreed to pay the rates did not give any right to the tenant to a deduction from the rent in order to ascertain the standard rent. This decision was approved by the Court of Appeal in *Isaacs v. Titlebaum*. (2) The point is discussed with fulness in the Irish case of *Lawrie v. Woods*. (3) See also per Lush J. in *Mackworth v. Hellard* (4), just affirmed by the Court of Appeal. (5) I do not think that the plaintiffs can say that

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(1) [1919] W. N. 241.

(3) [1920] 2 I. R. 106.

(2) [1920] W. N. 29.

(4) [1920] W. N. 377.

(5) [1921] W. N. 108.

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the standard rent is to be fixed by the rent of 130*l.* payable by the brewers to the owners of the premises under the lease of August, 1911. The brewers were not the occupying tenants in August, 1914. Circumstances, moreover, might have changed greatly between August, 1911, and August, 1914. I may also point out that if the August, 1911, lease were taken as the test it would follow that a long lease to the brewers by the owners in 1891 and continuing in August, 1914, might (if it had existed) have equally been put forward as the test. I respectfully hope and think that my ruling on the above point is consistent with the decision of the Divisional Court in *Lord Hylton v. Heal*. (1) The result therefore is that the defendant's landlords were not entitled to raise the defendant's rent to 130*l.*, and their notice of March 23, 1920, to that effect was of no validity. Even if the tenant had agreed to pay such rent the agreement would have been void under the Acts.

Since writing the above judgment, which has involved the consideration of several difficult and doubtful points, my attention has been called by counsel for the defendant to s. 12, sub-s. 1 (a), of the Rent Restrictions Act, 1920, which deals with the definition of standard rent. Neither counsel called my attention to such words during their arguments before me. The proviso to that subhead (a) is this: "Provided that, in the case of any dwelling house let at a progressive rent payable under a tenancy agreement or lease, the maximum rent payable under such tenancy agreement or lease shall be the standard rent; and, where at the date by reference to which the standard rent is calculated, the rent was less than the rateable value the rateable value at that date shall be the standard rent." If the words just cited from s. 12, sub-s. 1 (a), relate only to a case of progressive rent they would not, of course, apply to the action before me. But upon the whole I think that such proviso deals firstly with the case of a progressive rent, and secondly and separately with the case where at the date by reference to which the standard rent is calculated the rent was less than the rateable value. If so, then my view in favour of the defendant can be

(1) Ante p. 438.

rested on an additional ground. For here on August 3, 1914, the rent was only 24*l.*, whilst the rateable value was 24*l.* 16*s.* Hence it follows that the standard rent of the public-house cannot be more than 24*l.* 16*s.* The fact that the landlords' notice of March 23, 1920, was before the passing on July 2, 1920, of the existing Rent Restrictions Act does not seem to be material. The defendant has here tendered all and more than all the rent lawfully due from him. He has therefore committed no breach of obligation falling within s. 5 of the Act of 1920.

For the above reasons there must be judgment for the defendant.

Judgment for defendant.

Solicitors for plaintiffs : *Stevens, Son & Parkes.*

Solicitors for defendant : *Gibson & Weldon, for Pym & Pym, Belper.*

R. F. S.

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April 6, 8.

[1920. B. 123.]

Damages—Negligence—Action under Lord Campbell's Act—Death of Son four years old—Pecuniary Loss necessary to establish Cause of Action—Depositions and Verdict at Coroner's Inquest—Admissibility as Evidence—Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), ss. 1, 2.

The depositions of the evidence given in a coroner's inquisition together with the verdict and rider of the jury are not admissible in evidence in an action under Lord Campbell's Act, 1846, as proof of the defendant's negligence.

Bird v. Keep [1918] 2 K. B. 692, and *Calmenson v. Merchants' Warehousing Co.* [1921] W. N. 59, followed.

In an action under Lord Campbell's Act it is not sufficient for the plaintiff to prove that he has lost by the death of the deceased a mere speculative possibility of pecuniary benefit; in order to succeed it is necessary for him to show that he has lost a reasonable probability of pecuniary advantage.

ACTION tried before McCardie J.

The plaintiff sued under Lord Campbell's Act, 1846, as the personal representative of his infant son, Sidney Barnett, to

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recover damages for the death of his son from injuries received by the negligence of the defendants and their servants. The plaintiff brought the action for his own benefit.

The following statement of facts is taken from the judgment : " On Dec. 24, 1919, the child, Sidney Barnett, was walking along the pavement in Whitechapel Road. The defendants' servants were unloading long and heavy poles from a van which was drawn up by the kerb of the horseway. Two of the defendants' men took one of the poles, which was about 35 feet long and weighed about 5 cwt. One held the butt end of the pole on his shoulder, the second man held the other end of the pole on his arm. In order to get the pole through the gateway it was necessary for one of the men to wheel round and thus allow it, or cause it, to project temporarily into the horseway. Whilst it was so projecting a horse and cart came along. The driver failed to notice the pole, and his van struck it, thereby knocking it out of the hold of the defendants' two servants. As the pole fell to the ground it struck the plaintiff's child, who was just under it, and seriously crushed him. He died almost at once." The boy was at the date of his death just under four years of age and lived with the plaintiff.

Later in his judgment McCardie J. found the following facts in considering the question of damages : " The deceased child was a bright and healthy boy. He had gone to school when only two years of age. The plaintiff (his father) has two other children, both boys, aged 9 and 13. The plaintiff is a retail and wholesale trading engineer. He has a good business. He makes about 1000*l.* a year. His age is 40. His health is not good ; he suffers from nerves and a dilated heart. His wife is 33 ; her health is defective. The plaintiff meant to give the deceased child a good education ; to send him to an ordinary school till about 14 years old, then to a secondary school, and then, perhaps, to a university."

An inquest was held before the coroner and a common jury on December 31, 1919, when a substantial amount of evidence was given. The jury returned a verdict of accidental death, but added the following rider : " The jury are of

opinion that there should have been more careful outlook and supervision of such a dangerous operation."

The plaintiff claimed as damages in addition to the loss of the reasonable expectation of pecuniary benefit from the deceased boy if he had lived, the expenses connected with burial of his son, also the expenses which he incurred, being a Jew, in employing a watcher upon the body of his dead child, and also his loss through having to abstain from business for a space of time after the death. ✓

The defendants by their defence denied that the plaintiff had sustained any pecuniary loss by reason of the death of his son, and said that the action was not maintainable. They paid into Court 10*l.* with a denial of liability.

At the trial the plaintiff's counsel tendered as evidence of the defendants' negligence the depositions of the evidence given at the coroner's inquest together with the verdict and rider of the jury. The admissibility of this evidence was disputed on behalf of the defendants, but it was admitted by McCardie J. *de bene esse*.

Eventually, however, evidence was called on behalf of the plaintiff which in the opinion of McCardie J. proved that the defendants had been guilty of negligence causing the death of the plaintiff's son.

Hawkin for the plaintiff. The depositions and the verdict of the jury at the coroner's inquest are admissible as evidence at this trial under Order 37, r. 3, notice having been given to the defendants that application to read that evidence would be made to the Court on the trial of the action.

T. Scanlan and *Montague Berryman* for the defendants. The depositions of evidence taken at the inquest before the coroner and the verdict and rider of the jury are not admissible as evidence in these proceedings. In *Calmenson v. Merchants' Warehousing Co.* (1), Lord Dunedin pointed out that the object of an inquiry before a coroner is not to fix responsibility upon anyone, and that the expression of opinion of a coroner's jury, even if it touches the question of

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responsibility, cannot be made evidence by any admission, and he stated that to put in the evidence as a whole was a highly objectionable proceeding: see also Halsbury's Laws of England, vol. 8, title "Coroners" (Inquests), p. 291, par. 665.

[McCARDIE J. The Court of Appeal held in *Bird v. Keep* (1) that neither the record of the coroner's inquisition nor the certificate of death was admissible as evidence of the cause of death in an application for an award under the Workmen's Compensation Act, 1906.]

Order 37, r. 3, does not make anything admissible in evidence which would not be admissible but for that Order. Order 37, r. 18, provides that depositions shall not be given in evidence without the consent of the party against whom the same be offered or by leave of the Court or judge.

A plaintiff in order to succeed in an action under Lord Campbell's Act, 1846, must prove that he has lost some pecuniary benefit or some reasonable prospect of pecuniary benefit by the death of the deceased: *Bramall v. Lees* (2); *Duckworth v. Johnson* (3); *Taff Vale Ry. Co. v. Jenkins*. (4) A bare chance of receiving pecuniary help is, however, too remote a head of damage upon which to found the action: *Stimpson v. Wood* (5); *Harrison v. London & North Western Ry. Co.* (6); Halsbury, Laws of England, vol. 21, title "Negligence," p. 459, par. 777. There is no evidence that the plaintiff had a reasonable expectation of pecuniary benefit from the continuance of the life of the deceased. The dead boy would have been a source of expenditure to the plaintiff in respect of his maintenance and education for at least ten years and probably longer. During that period the boy would have been subject to the possibility of disease, accident, and death. Further, the question as to the expectation of the life of the plaintiff himself must also be taken into account: see per Bray J. in *Price v. Glynea and Castle Coal Co.* (7) In any event the plaintiff is not entitled to recover in respect

(1) [1918] 2 K. B. 692.

(2) (1857) 29 L. T. (O. S.) 111.

(3) (1859) 29 L. J. (Ex.) 25; 4 H. & N. 653.

(4) [1913] A. C. 1.

(5) (1888) 57 L. J. (Q. B.) 484.

(6) (1885) Cab. & El. 540.

(7) (1915) 9 B. W. C. C. 188, 198.

of the funeral expenses: *Clark v. London General Omnibus Co.* (1), nor in respect of the special expenses and loss of business which he incurred through complying with his religious duties as a Jew.

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Hawkin in reply. The plaintiff is entitled to recover damages for the death of his boy through the defendants' negligence. Although he was only four years old, he was an exceedingly bright lad, and the plaintiff had a reasonable prospect of deriving pecuniary gain if he had lived. *Bramall v. Lees* (2) is a strong authority in favour of the plaintiff, because the boy in that case had never earned anything. In *Condon v. Great Southern & Western Ry. Co.* (3) damages were recovered for the death of a boy who had never earned any wages, and it was held that the probability that he would have devoted part of his earnings to his mother's support was evidence on the question of damages. In *Hetherington v. North Eastern Ry. Co.* (4) damages were also recovered by a father for the death of a son who had contributed to his support some five or six years previously but had not done so since. [*Holleran v. Bagnell* (5) was also cited.]

Cur. adv. vult.

April 8. McCARDIE J. read the following judgment. This action is brought by the plaintiff under Lord Campbell's Act, 1846, to recover damages for the death of his son Sidney through the negligence of the defendants. He sues as legal personal representative and states that he brings the suit for his own benefit. The child was killed in December, 1919. He was then just under four years of age. He lived with the plaintiff.

The case is of legal interest for two distinct reasons. In the first place it raises a question as to the admissibility in evidence of the testimony given before, and the verdict of, a coroner's jury. In the second place it raises a question

(1) [1906] 2 K. B. 648.

(3) (1865) 16 Ir. C. L. Rep. 415.

(2) (1857) 29 L. T. (O. S.) 111.

(4) (1882) 9 Q. B. D. 160.

(5) (1879) 6 L. R. Ir. 333.

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as to the proof of damage required under Lord Campbell's Act.

The facts as to the death can be stated very briefly. [His Lordship read the facts set out above and continued :] Hence the plaintiff's action against the defendants for the negligence of their servants. Such are the undisputed facts. The other brief facts I will state later. To the circumstances already stated Mr. Hawkin claimed to add as admissible testimony (1.) the evidence before the coroner on December 31, 1919, and (2.) the verdict and rider of the coroner's jury. A substantial amount of evidence (which I need not detail) was given in the coroner's court. The verdict was accidental death. The rider was this : " The jury are of opinion that there should have been more careful outlook and supervision of such a dangerous operation." This, I think, was (in substance) a finding of negligence against the defendants. Mr. Hawkin claims that I should act on that finding. Mr. Scanlan, for the defendants, vigorously argues that I should reject in toto the evidence, verdict, and rider or finding before the coroner. Both counsel asked that I should give a definite ruling on the question inasmuch as uncertainty prevails in the profession as to the law.

I cannot myself think that the matter admits of any real doubt at the present day. It is well, however, to deal clearly with the point so far as it concerns civil causes. In former days a measure of confusion existed as to the effect of proceedings before a coroner : see Phipson on Evidence, 5th ed., p. 336. The distinction between judgments as to status or judgments in rem on the one hand and judgments or findings of a different nature was not fully or clearly appreciated : see Taylor on Evidence, 11th ed., s. 1674. I need not analyse the question now, for the whole subject is illuminated by the judgments of the Court of Appeal in *Bird v. Keep*. (1) There a question arose under the Workmen's Compensation Act, 1906. It was held by the Court that the record of the coroner's inquisition was not admissible as evidence of the cause of death. The relevant decisions were carefully

(1) [1918] 2 K. B. 692.

examined by Swinfen Eady M.R. and Bankes L.J. and the principles involved were considered. The argument of Mr. A. Powell K.C. for the applicant may be taken as representing the submission of Mr. Hawkin in the present case. It was pointed out by Swinfen Eady M.R. that at different periods of our legal history different views have existed on the position. The effect of the judgment of Swinfen Eady M.R. is thus put (1): "I am of opinion that the result of an investigation conducted by the coroner, however valuable for certain purposes, cannot in law be treated as *prima facie* evidence against any person of the facts found by the jury." This case of *Bird v. Keep* (2) is not perhaps as widely known as may be wished. That the view of the Court of Appeal in *Bird v. Keep* (2) may be treated as authoritative seems to be clear from the opinions expressed in the House of Lords in *Calmenson v. Merchants' Warehousing Co.* (3), reported only in the Weekly Notes. There Lord Dunedin (with the concurrence of Lord Shaw) deprecated reliance in an action under Lord Campbell's Act upon the proceedings before the coroner. He said this: "The primary object of an inquiry before a coroner is not to fix responsibility on anyone; the parties to the action at law are not necessarily represented at the inquest, and attention is not directed by examination and cross-examination to many points which may be of importance in the action. The expression of opinion of the coroner's jury, even if it touches the question of responsibility, cannot be made evidence in the action by any admission. Evidence given at an inquest may legitimately be used for the purposes of cross-examination of a witness at the trial." Such are the two guiding authorities. I therefore reject wholly in the present case the evidence, verdict, and rider in the proceedings before the coroner. I should mention that Mr. Hawkin for the plaintiff sought to rely on Order 37, r. 3, which provides that "an order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on

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(1) [1918] 2 K. B. 699.

(2) *Ibid.* 692.

(3) [1921] W. N. 59.

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ex parte applications by leave of the Court or a judge, to be obtained at the time of making any such application, and in any other case upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence." In my view that rule of Court does not assist the plaintiff. In the first place it relates to evidence only and not to verdicts or judgments. Secondly, it does not alter the laws of evidence. As Lord Esher M.R. put it in *Printing Telegraph, etc., Co. v. Drucker* (1): "The rule does not make that evidence which is not by law evidence." The conditions under which advantage can be taken of Order 37, r. 3, are shown by the case just cited and by such decisions as *Morgan v. Nicholl* (2), *In re De Burgho's Estate* (3), and *Llanover v. Homfray*. (4) See the notes to Order 37, r. 3, in the Yearly Practice of the Supreme Court, 1921.

I must therefore form an independent opinion as to whether the defendants were guilty of negligence causing the death of the plaintiff's son. In my view such negligence is established. A considerable body of evidence was called before me at the trial. I need not detail it. On that evidence I am satisfied that the defendants were negligent in several respects. First, they failed to exercise proper supervision over the unloading of the poles. Secondly, they failed to warn approaching traffic of the projection of the poles into the horseway. Thirdly, they failed to warn foot passengers on the pavement of the danger of a falling pole; and fourthly, the two servants of the defendants ought not to have allowed the pole in question to project into the roadway just as a horse and cart were approaching. I therefore find that the death of the plaintiff's son was due to the defendants' negligence.

This finding gives rise to the second question—namely, Has the plaintiff proved the pecuniary loss requisite to establish a cause of action? This point was well and fully argued by counsel. I need only state a few relevant facts. [His

(1) [1894] 2 Q. B. 801, 803.

(3) [1896] 1 I. R. 274.

(2) (1866) L. R. 2 C. P. 117.

(4) (1881) 19 Ch. D. 224.

Lordship then read the second statement of facts set out above and continued:] The plaintiff's claim to damages must rest in substance upon his anticipation of the future services and help or the pecuniary aid in the future of the son, who at four years of age is now dead.

Now the directly material words in s. 2 of Lord Campbell's Act, 1846, are these: "In every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought." These words are but rarely cited in the decisions, but it is essential to recall them if those decisions are to be understood. Lord Campbell's Act created a wholly new cause of action with a novel body of features as to damages: see Pollock on Torts, 11th ed., pp. 66 and 68. Nothing can be given by way of solatium for the injured feelings of the relatives: see *Blake v. Midland Ry. Co.* (1) All that can be dealt with or assessed is pecuniary loss: see *Blake's Case* (1) and Beven on Negligence, 3rd ed., pp. 184, 185. I need not consider the cases where a wife sues for the death of her husband or a child for the death of its father. Here the father sues for the death of his infant child. Now at one time it was thought that a father would fail in his action unless he gave proof of pecuniary advantage in actual existence prior to or at the time of the death of the child: see e.g. *Holleran v. Bagnell*. (2) In that case the child was seven years of age. She rendered some slight household services. Morris C.J. said that there was no instance of an action for loss caused to a plaintiff by the death of a person of such a tender age. He added: "There should be distinct evidence of pecuniary advantage in existence prior to or at the time of the death." This latter remark of Lord Morris (then Morris C.J.) has, however, been nullified by the opinion of the House of Lords in *Taff Vale Ry. Co. v. Jenkins* (3), where the dead child was a girl aged sixteen. There Lord Haldane said (4): "The basis is not what has been called solatium,

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(1) (1852) 18 Q. B. 93.

(2) 6 L. R. Ir. 333.

(3) [1913] A. C. 1.

(4) Ibid. 4.

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that is to say, damages given for injured feelings or on the ground of sentiment, but damages based on compensation for a pecuniary loss. But then loss may be prospective, and it is quite clear that prospective loss may be taken into account. It has been said that this is qualified by the proposition that the child must be shown to have been earning something before any damages can be assessed. I know of no foundation in principle for that proposition either in the statute or in any doctrine of law which is applicable; nor do I think it is really established by the authorities when you examine them." Later Lord Haldane said (1): "I have already indicated that in my view the real question is that which Willes J. defines in one of the cases quoted to us, *Dalton v. South Eastern Ry. Co.* (2): 'Aye or No, was there a reasonable expectation of pecuniary advantage?' " The House of Lords affirmed the verdict of the jury for 75*l.* damages.

Now this question of reasonable expectation of pecuniary advantage seems to me to be a mixed question of fact and law. Mere difficulty in assessing damages should not bar a plaintiff from recovering: see the principle involved in *Chaplin v. Hicks*. (3) But, on the other hand, I think that the plaintiff must adduce such evidence as affords the judge a reasonable basis on which to infer that pecuniary damage has been inflicted on the plaintiff. Such a basis was held to exist in *Bramall v. Lees* (4), where the father secured a verdict for 15*l.* before Crompton J. and a jury, although the child was only twelve years old, was earning nothing, and was at the time of its death pecuniarily a burden to its parents. Apparently the verdict was based on the ground that in the course of a year or two the child would have earned wages at a factory near its father's home. A rule nisi for a new trial was granted by the Exchequer Court, but was not, I gather, further pursued.

In *Duckworth v. Johnson* (5) the father gained a verdict for

(1) [1913] A.C. 6.

(3) [1911] 2 K. B. 786.

(2) (1858) 4 C. B. (N. S.) 296.

(4) 29 L. T. (O. S.) 111.

(5) 4 H. & N. 653.

20*l.* for the death of his son aged fourteen who had when twelve years old earned 4*s.* a week in a painter's shop. In discharging the rule nisi for a new trial Pollock C.B. said (1): "My opinion is that, looking at the Act of Parliament, if there was no damage the action is not maintainable. It appears to me that it was intended by the Act to give compensation for damage sustained, and not to enable persons to sue in respect of some imaginary damage, and so punish those who are guilty of negligence by making them pay costs." The Court, however, felt that there was just enough evidence there to support the verdict. The matter was put somewhat vaguely by Watson B. in the course of his judgment when he said "there must be some evidence of a prospect of benefit."

I think that the only way to distinguish between the cases where the plaintiff has failed from the cases where he has succeeded is to say that in the former there is a mere speculative possibility of benefit, whereas in the latter there is a reasonable probability of pecuniary advantage. The latter is assessable. The former is non-assessable. This test, though necessarily loose, seems to be the only one to apply. The plaintiff, a widow, failed in *Stimpson v. Wood* (2) because, as I read the decision of Manisty and Stephen JJ., there was nothing more than a mere possibility of loss upon the facts of the case. So, too, in *Harrison v. London & North Western Ry.* (3) the plaintiff, a husband, was also defeated because he failed to prove anything more than a possibility of loss through the death of his wife. As Lopes J. said (4): "I must take into account all the circumstances of the case, and all the contingencies and uncertainties that arise."

The case which might appear to go nearest in favour of the present plaintiff is *Wolfe v. Great Northern Ry. Co.* (5), where the plaintiff, a telegraph clerk, obtained a verdict for 150*l.* for the death of his daughter, aged ten, who helped her parents in the house and who, moreover, was of such exceptional value in that way as to enable them to dispense with

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(1) 4 H. & N. 657.

(3) Cab. & El. 540.

(2) 59 L. T. (N. S.) 218.

(4) Ibid. 541.

(5) (1890) 26 L. R. Ir. 548.

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a servant. The Irish Court of Appeal held that there was evidence which justified the jury in the conclusion that the services of the deceased were of a pecuniary value exceeding the cost of her maintenance and education. The verdict, however, was reduced to 50*l*. The facts in that case were exceptional as to the value of the child.

In the present action the plaintiff has not satisfied me that he had a reasonable expectation of pecuniary benefit. His child was under four years old. The boy was subject to all the risks of illness, disease, accident and death. His education and upkeep would have been a substantial burden to the plaintiff for many years if he had lived. He might or might not have turned out a useful young man. He would have earned nothing till about sixteen years of age. He might never have aided his father at all. He might have proved a mere expense. I cannot adequately speculate one way or the other. In any event he would scarcely have been expected to contribute to the father's income, for the plaintiff even now possesses 1000*l*. a year by his business and may increase it further, nor could the son have been expected to aid in domestic service. The whole matter is beset with doubts, contingencies, and uncertainties. Equally uncertain, too, is the life of the plaintiff himself in view of his poor health. He might or might not have survived his son. That is a point for consideration, for, as was pointed out by Bray J., when sitting in the Court of Appeal, in *Price v. Glynea and Castle Coal Co.* (1): "Where a claim is made under Lord Campbell's Act, as it is here, it is not only a question of the expectation of life of the deceased man, but there is also a question of the expectation of the life of the claimant." Upon the facts of this case the plaintiff has not proved damage either actual or prospective. His claim is pressed to extinction by the weight of multiplied contingencies. The action therefore fails.

Even if I had awarded damages they would not have exceeded the 10*l*. paid into Court by the defendants with a denial of liability. The suggested heads of damage, other

than the one I have above dealt with, are clearly invalid. The burial expenses are not recoverable : see *Clark v. London General Omnibus Co.* (1) Upon the same principle I am debarred from allowing either the expenses incurred by the plaintiff, in deference to his religious duties as a Jew, in procuring a watcher upon the body of his dead child, or the loss he was put to through the like duties in abstaining from business labours for a space of time after the death. I sympathise with the plaintiff in the loss of his child, but I am bound in law to give judgment for the defendants.

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Judgment for defendants.

Solicitors for plaintiff : *Saunders, Sobell & Co.*

Solicitor for defendants : *F. J. Berryman.*

R. F. S.

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Ex parte AHMED HAMID MOUSSA.

Justices—Appeal—Sentence of One Month's Imprisonment—Recommendation for Deportation—Alien—Failure of Egyptian to register Change of Address—Ambiguous Plea—Right of Appeal—Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 50—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 19—Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), s. 37.

Sect. 50 of the Metropolitan Police Courts Act, 1839, gives a right of appeal to Quarter Sessions from a summary conviction where "the penalty adjudged shall be imprisonment for any time more than one calendar month" :—

Held, that where a person is convicted summarily and the magistrate sentences him to imprisonment for one month and recommends the making of an order for his deportation, that recommendation is not part of the "penalty adjudged" within s. 50. In such a case, therefore, the person convicted has no right of appeal under the section.

The applicant was charged under the Aliens Order, 1920, with, being an alien, having failed to notify his change of address. When before the magistrate he was asked "Are you an Egyptian?" to which he answered "Yes." He was then asked "Did you tell the registration

(1) [1906] 2 K. B. 648.

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officer that you intended to change your residence, and tell him when and where you were going ? ” to which he answered “ No.” Thereupon the magistrate entered a plea of guilty and sentenced the applicant to imprisonment for one month and recommended the making of a deportation order against him.

Held (Avory J. dissenting), that the applicant had not pleaded guilty or admitted the truth of the charge within s. 19 of the Summary Jurisdiction Act, 1879, or s. 37 of the Criminal Justice Administration Act, 1914, and, therefore, that he had a right of appeal to Quarter Sessions by virtue of those sections.

RULE NISI for a mandamus directed to Mr. Graham Campbell, one of the metropolitan police magistrates, to show cause why he should not take the recognizances of the applicant Ahmed Hamid Moussa and his sureties upon his appeal against a conviction.

On March 14, 1921, the applicant was charged under para. 6 (1.) (c) of the Aliens Order, 1920, with, being an alien, having failed to notify to the registration officer of the district in which he resided particulars as to the date on which his residence was to be changed, and to his intended place of residence, he being, on or about March 12, 1921, about to change his residence. At the hearing, the applicant having been asked if he wished to be tried by a jury or by the magistrate, and having replied that he desired to be tried by the magistrate, the Clerk, in accordance with the practice of the Court in taking pleas from foreigners who frequently do not understand the expression “ plead guilty,” said to the applicant “ Are you an Egyptian ? ” to which he answered “ Yes.” He was then asked “ Did you tell the registration officer that you intended to change your residence, and tell him when and where you were going ? ” to which the applicant answered “ No.” Thereupon the magistrate entered a plea of guilty, and after hearing the registration officer and the applicant’s statement in mitigation of the offence and his admission that he had been previously convicted of a like offence, the magistrate convicted the applicant, sentenced him to imprisonment for one month without hard labour, and recommended the making of a deportation order.

On March 21 notice of appeal against the conviction was served, and on March 22 application was made by counsel to

the magistrate to take the recognizances of the applicant and his sureties. Counsel contended that an Egyptian was a British subject, and that therefore the applicant's admission of his nationality did not constitute an admission of the offence which could only be committed by an alien. The magistrate declined to hold that an Egyptian was not an alien; he had, as he said, already, by the conviction, decided the contrary. He therefore declined to take the recognizances, being of opinion that there was no right of appeal under s. 19 of the Summary Jurisdiction Act, 1879, or s. 37 of the Criminal Justice Administration Act, 1914, because the applicant had admitted the truth of the charge, or under s. 50 of the Metropolitan Police Courts Act, 1839, because the penalty adjudged was not imprisonment for more than one calendar month.

This rule was then obtained, the grounds being that the sentence and recommendation for deportation constituted a penalty exceeding a penalty of imprisonment for one calendar month; that an Egyptian was not an alien; that the applicant's answers to the magistrate did not constitute a plea of guilty or an admission of the truth of the charge; and that the applicant had a right of appeal under s. 19 of the Summary Jurisdiction Act, 1879, or s. 37 of the Criminal Justice Administration Act, 1914.

On the return to the rule the following certificate from the Foreign Office was read:—

“By the authority of the Secretary of State for Foreign Affairs, I certify that in virtue of the protectorate declared over Egypt by His Majesty's Government on December 18, 1914, His Majesty's diplomatic and consular officers afford protection to Egyptians, but the existence of the protectorate does not make Egyptians British subjects.

“(Signed) EYRE A. CROWE,

“Permanent Under-Secretary of State for Foreign Affairs.”

Sir Gordon Hewart A.-G. and *G. A. H. Branson* showed cause. The magistrate was right in refusing to take the recognizances. The burden of proving that he was not an alien lay upon the applicant: Aliens Restriction Act, 1914, s. 1, sub-s. 4,

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and he failed to discharge this onus. He is an Egyptian and does not come within any of the categories of those who can claim British nationality. The Foreign Office certificate shows that he is not a British subject. That being so, the admission by the applicant that he was an Egyptian and that he had not notified the registration officer of his change of address was an admission of the truth of the charge against him within s. 19 of the Summary Jurisdiction Act, 1879, and s. 37 of the Criminal Justice Administration Act, 1914, so as to take away the right of appeal. Nor has he any right of appeal under s. 50 of the Metropolitan Police Courts Act, 1839. By that section an appeal to Quarter Sessions is given (*inter alia*) where "the penalty adjudged shall be imprisonment for any time more than one calendar month." In this case the penalty adjudged was not more than one calendar month, the recommendation by the magistrate for the applicant's deportation being no part of the "penalty adjudged"; nor is the detention of an alien under para. 12 (4.) of the Aliens Order, 1920, till he can be placed on a ship about to leave the United Kingdom, part of the "penalty adjudged." It is true that in the Criminal Appeal Act, 1907, the expression "sentence" includes "any recommendation of the Court as to the making of an expulsion order in the case of a person convicted," but it required the special provision of s. 21 to bring a deportation order within the expression "sentence," for the purposes of that statute.

Holman Gregory K.C. and *J. D. Casswell* in support of the rule. The recommendation for the deportation of the applicant was part of the "penalty adjudged" within s. 50 of the Act of 1839. This is clear from the provisions of the Aliens Order, 1920, for by para. 12 (7.) it is provided that "where any case in which a Court has made a recommendation for deportation is brought by way of appeal against conviction or sentence before any higher Court, and that Court certifies to the Secretary of State that it does not concur in the recommendation, such recommendation shall be of no effect." The recommendation being thus part of the "penalty adjudged," the applicant has a right of appeal. Further, he

has a right of appeal under s. 19 of the Summary Jurisdiction Act, 1879, and s. 37 of the Criminal Justice Administration Act, 1914. Those sections entitle a person aggrieved to appeal if he "did not plead guilty, or admit the truth of the information." It cannot be said that the applicant admitted the truth of the information. He was charged, "being an alien," with having failed to notify his change of address. He did not admit, and never intended to admit, being an alien. He said he was an Egyptian and desired to contend that, as such, he was not an alien, and he is entitled to have that question considered by Quarter Sessions on his appeal.

[They cited *Harris v. Cooke*. (1)]

AVORY J. In my opinion this rule should be discharged. The question is whether the magistrate should be ordered to take the recognizance of the applicant with the view to an appeal to Quarter Sessions. The magistrate cannot be ordered by this Court to take the recognizance unless the applicant has established that he has a right to appeal to Quarter Sessions. In order to show that he must bring himself within s. 19 of the Summary Jurisdiction Act, 1879, or s. 37 of the Criminal Justice Administration Act, 1914, or s. 50 of the Metropolitan Police Courts Act, 1839. To bring himself within s. 19 of the Act of 1879 or s. 37 of the Act of 1914, he must for this purpose satisfy this Court that he did not plead guilty or admit the truth of the charge; and to bring himself within s. 50 of the Act of 1839 he must satisfy us that the penalty adjudged was imprisonment for any time more than one calendar month. Mr. Gregory has contended that the applicant had brought himself within all those sections on the ground that he did not admit the truth of the charge, and, further, that the penalty adjudged was in fact more than imprisonment for one calendar month.

Upon the first point there is a difference of opinion in this Court. In my view the applicant did admit the truth of the charge. For the purposes of this application he must be taken to be an Egyptian subject. It follows, therefore, in

(1) [1918] W. N. 317; 83 J. P. 72,

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my opinion, that he is an alien. He was charged with, being an alien, failing to notify to the registration officer particulars of his change of address. He is a man who had already been convicted under the Aliens Order, 1920. We are informed that he is an educated man who understands English perfectly, and he knew quite well what the nature of the charge against him was on this occasion. The applicant being a foreigner, the course usually adopted in such cases was followed, and instead of being asked "Do you plead guilty or not guilty?" was asked "Are you an Egyptian?" To which he replied "Yes." He then admitted that he had failed to notify the registration officer the particulars as to his change of address. It appears to me that there was nothing more that could be admitted by the applicant to constitute the commission of this offence. The moment the applicant admitted that he was an Egyptian he admitted that he was an alien, and having admitted that, and, further, that he had failed to notify the registration officer, he was admitting the truth of the charge against him. It is suggested that he ought to have been asked, "Are you an alien?" or "Do you admit that you are an alien?" If he had been asked that and said "Yes," I can quite understand an argument being advanced that he did not admit the truth of the charge, because he might have been mistaken as to his view of the law as to what constitutes an alien. But the moment the applicant admitted that he was an Egyptian it was for the magistrate to determine as a matter of law and of common sense whether an Egyptian is an alien. The magistrate could not determine otherwise than he did that an Egyptian is an alien. Therefore, in my opinion, the applicant had no right of appeal under either s. 19 of the Act of 1879 or s. 37 of the Act of 1914.

I am also of opinion that the applicant had no right of appeal under s. 50 of the Act of 1839. The question is, is this a case in which the "penalty adjudged" was imprisonment for any time more than one calendar month? It is true that in addition to the adjudication of the penalty of imprisonment for one month the magistrate made a

recommendation to the Home Secretary that the applicant should be deported, and Mr. Gregory has based an argument upon para. 12 (7.) of the Aliens Order, 1920, which provides that where a Court has made a recommendation for deportation and there is an appeal to a higher Court, that Court may certify to the Secretary of State that it does not concur in that recommendation, and thereupon it has no effect. That, however, has no bearing upon the question whether in fact in this case the penalty adjudged was imprisonment for more than one calendar month. There was, in my opinion, no adjudication of any penalty beyond that of imprisonment for one month; and the recommendation for deportation was no part of the penalty adjudged. So far as this section is concerned I would suggest, as a further illustration of my view, the case, which is of frequent occurrence, where a man is sent to prison for one month for assault, and in addition is ordered to find sureties to keep the peace. I entertain no doubt that in such a case no right of appeal is conferred, because in addition to the imprisonment the man is ordered to find sureties to keep the peace. That is not a case where the penalty adjudged is imprisonment for more than one calendar month within s. 50. I do not agree with Mr. Gregory's contention that if a person suggests that he wishes to argue whether he has a right of appeal he can call upon the magistrate to take his recognizance in order to give him the opportunity of arguing that question at Quarter Sessions. Where it is plain, as in my opinion it is in this case, that there is no right of appeal, the magistrate is justified in refusing to take the recognizance.

SANKEY J. The only question for our determination in this case is whether the applicant has a right of appeal. Mr. Gregory has argued that the applicant has a right of appeal under s. 50 of the Act of 1839, or s. 19 of the Act of 1879, or s. 37 of the Act of 1914. The applicant was sentenced to imprisonment for one month without hard labour, and the magistrate further recommended the making of a deportation order. As to the point that the applicant had a right of

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appeal under s. 50 of the Act of 1839 I entirely agree with Avory J. It is said on behalf of the applicant, first, that the penalty adjudged was more than imprisonment for one calendar month, because there was the recommendation for the applicant's expulsion, and secondly, that in fact he might have to serve more than one calendar month. As to the first of these points I do not think it is possible to say that a recommendation for deportation in these circumstances comes within the term "penalty" in s. 50; I doubt whether it is a penalty at all, because it is no part of the order of the magistrate that the applicant should be deported, for the most that the magistrate can do is to recommend that a certain course be taken by the Home Secretary with whom it lies whether he will act upon the recommendation or not. As to the second point, it is not I think possible to say that the applicant is adjudged imprisonment for more than one calendar month. It is true that he may be longer in prison than one month, but the reason is not because this has been adjudged by the magistrate, but because it is provided by para. 12 (4.) of the Aliens Order, 1920, that "an alien with respect to whom a deportation order is made, or a certificate is given by a Court with a view to the making of a deportation order, may be detained in such manner as may be directed by the Secretary of State, and may be placed on a ship about to leave the United Kingdom, and shall be deemed to be in legal custody whilst so detained, and until the ship finally leaves the United Kingdom." Therefore there are two different periods, first, the period during which the applicant is serving the penalty of one month's imprisonment, and secondly, the period when he is detained, not imprisoned strictly so called, but detained in custody, till he leaves the United Kingdom. I agree that Mr. Gregory's point on s. 50 fails.

As to the point that there is a right of appeal under s. 19 of the Act of 1879 or s. 37 of the Act of 1914—both sections, so far as material, are in the same words—what we have to determine is, did the applicant plead guilty or admit the truth of the charge? Upon that question, which may be said to be a question of fact, I have the misfortune to differ from

Avory J. I do not read the conversation which led to the magistrate entering a plea of guilty as indicating either that the applicant pleaded guilty—the magistrate states specifically that he thereupon entered a plea of guilty—or that the applicant admitted the truth of the charge. It is perfectly true that the applicant had been previously convicted of a like offence, but it may be that he wished to take the point that although an Egyptian he was not an alien. The fact, therefore, that he said he was an Egyptian and admitted that he had not notified the registration officer of his change of address did not amount to a plea of guilty or an admission of the truth of the charge. On that ground, I think the applicant had a right of appeal, and that the rule should therefore be made absolute.

DARLING J. I entirely agree with Avory and Sankey JJ. in holding that the recommendation to the Home Secretary that he should make an order for the expulsion of the applicant is not a part of the “penalty adjudged” within s. 50 of the Act of 1839. The reasons given by my brothers for so holding make it unnecessary for me to add anything to what they have said.

There remains the question, should the rule be made absolute or discharged? As to that, I take the same view as Sankey J. It is perfectly plain that the applicant, when he was charged, desired to argue that he was not an alien and to rely upon the fact that he was an Egyptian to support that contention. That contention may be good or may be bad; I have a very definite opinion upon it, but it is unnecessary to express it. He was not charged with being an Egyptian, but with being an alien, and what we have to see is whether he is precluded from appealing because he either pleaded guilty or admitted the truth of the charge. I come to the conclusion that he did not admit the charge, for there was something still to be admitted by him before he can be said to have pleaded guilty or admitted the truth of the charge. The case against him resolves itself into this syllogism: all Egyptians are aliens, the applicant admits that he is an Egyptian, therefore

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he admits that he is guilty. He says, however, that the conclusion is false. He says: "I admit I am an Egyptian, but I say you are not therefore entitled to draw the conclusion that I am an alien, or to say that I admit the truth of the charge." All the applicant admitted was that he was an Egyptian; and he desired to contend that an Egyptian is not an alien. The magistrate has taken the applicant's partial admission as an admission of the truth of the whole charge. I think that the magistrate was wrong, and therefore that the rule should be made absolute.

Rule absolute.

Solicitor for applicant : *J. H. MacDonnell.*

Solicitor for magistrate *Treasury Solicitor.*

J. S. H.

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 April 15.

LUCAS v. REUBENS.

Shops—Closing Hours—Order of local Authority—Shops wherein retail Trade or Business of Jeweller carried on—Auctioneer selling Jewellery—Shops Act, 1912 (2 Geo. 5, c. 3), s. 19.

By the Shops Act, 1912, a local authority may make an Order fixing the closing hours for shops within their district, and defining the shops and trades to which the Order applies. By s. 19, sub-s. 1, "the expression 'shop' includes any premises where any retail trade or business is carried on," and "the expression 'retail trade or business' includes" (inter alia) "retail sales by auction."

An Order made under the Act fixed the closing hours for shops "in which the retail trade or business of a jeweller, gold or silversmith, ironmonger, hardware merchant, or tool dealer is carried on." The respondent, who was an auctioneer, and who sold on his premises, being a shop, all kinds of articles, including articles of jewellery entrusted to him for sale by auction and pawnbrokers' pledges, sold by auction in the ordinary way, on certain days after the closing hours fixed by the Order, articles of jewellery :—

Held, that the respondent had not thereby carried on the retail business of a jeweller within the meaning of the Order.

CASE stated by the Middlesbrough Stipendiary Magistrate.

The respondent was summoned on three informations for having, on November 12 and 13 and December 3, 1920, kept

open his premises for the serving of customers after the closing hours fixed by the Middlesbrough (Shops Act, 1912) Closing Order, 1919, which provided for the closing, for the serving of customers, after certain specified hours, of all shops in Middlesbrough "in which the retail trade or business of a jeweller, gold or silversmith, ironmonger, hardware merchant, or tool dealer is carried on." A further clause provided that shops where any other trade or business besides that affected by the Order was carried on, might, subject to certain conditions, be kept open for such other trade or business.

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The respondent was an auctioneer who sold by auction at his premises, being a shop, in Middlesbrough, all kinds of articles, including articles of jewellery, entrusted to him for sale by auction, and pawnbrokers' pledges. He had for thirty years been a licensed auctioneer and conducted a genuine business. He had not been consulted by any jewellers or any one else when the Order was brought into being, but the intention of the local authority to make the Order was locally advertised and an opportunity was given to shopkeepers affected by the proposed Order to make their objections thereto. On the three days in question he sold and offered for sale by auction in the ordinary way, after the closing hour fixed by the Order, to members of the public who had entered his premises, articles of jewellery, including gold alberts, watches, brooches and an electro-plated tea and coffee set, and it was contended that thereby he had carried on the retail trade or business of a jeweller in contravention of the Order.

The magistrate dismissed the informations, being of opinion that the respondent could not be said to have carried on the retail trade or business of a jeweller within the meaning of the Order; and the question for the Court was whether he was right in so holding.

Micklethwait for the appellant. The magistrate was wrong in holding that the respondent did not come within the scope of the Order. The Order fixes closing hours for, among others,

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jewellers. A jeweller is a person who deals in jewellery, and an auctioneer who sells jewellery is none the less a jeweller because he sells it in a particular way. That auctioneers are included among retail shopkeepers is clear from the fact that by clause (b) of the proviso to s. 9 of the Shops Act, 1912, a special exception is made in favour of auction sales of private effects in private dwelling houses, and further, from the fact that retail sales by auction are included in the definition of "retail trade or business" in s. 19, sub-s. 1, of the Act. The fact that an auctioneer or any other shopkeeper deals in many different kinds of articles creates no difficulty, as s. 10 of the Act makes provision for shops where more than one business is carried on.

Beyfus for the respondent. As the local authority have not purported to deal in their Order with the trade or business of an auctioneer, the respondent is not affected by its terms. If the appellant's contention were upheld the result might be that an auctioneer could not carry on his business at all in the afternoon or evening for he might be affected, according to what articles he was selling, by different Orders relating to different trades fixing different closing days and hours for each. It is impossible for an auctioneer to say within s. 10 what is his principal trade or business, seeing he sells all kinds of goods as they are sent in to him. The respondent was not carrying on the trade of a jeweller by selling by auction various articles of jewellery.

Micklethwait replied.

A. T. LAWRENCE C.J. This appeal fails. The respondent was not "carrying on" the business of a jeweller merely because he happened to sell, among other goods, articles of jewellery in his auction mart. If that place was habitually used for the sale of jewellery, and jewellery was the principal thing sold, the argument addressed to us by Mr. Micklethwait might probably be sound and the respondent might come within the purview of the Order. To come within the Order auctioneers should have been named therein, and if that had been done all auctioneers would have been equally affected.

The Shops Act, 1912, and this Order were not in my view intended to apply to such a case as this.

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DARLING J. I am of the same opinion. This Order, made under the power conferred by s. 4 of the Shops Act, 1912, required jewellers' and certain other shops to be closed after a certain hour. The respondent is an auctioneer and it is said that he is also a jeweller, because in s. 19 of the Act it is provided that the expression "shop" includes any premises where any retail trade or business is carried on, and the expression "retail trade or business" includes (inter alia) "retail sales by auction." It is perfectly plain therefore that an Order might be made which would include retail sales by auction. That however was not done. What has been done is to fix a closing hour for shops in which the retail trade or business of a jeweller, gold or silversmith, ironmonger, hardware merchant, or tool dealer is carried on; and it is contended that if an auctioneer sells a piece of jewellery he is carrying on the business of a jeweller; and by virtue of s. 19 that he is keeping a jeweller's shop. So too it would follow that whenever an auctioneer sells by auction pokers and tongs he is carrying on the business of an ironmonger or hardware merchant. Orders may be made by the local authority with regard to various trades fixing the same day for early closing or fixing different days for different trades or different days for different parts of the district. The respondent, if he comes within the Order, would have to ask himself whenever he put up any article for sale, what is the closing day for shops in which this kind of article is sold? Sometimes he would be acting as a jeweller, at others as an ironmonger, and whether he committed an offence or not would depend upon what he was selling at the moment and the day fixed by the Order in respect of those shops in which that particular kind of article was sold. On this view the respondent would be practically debarred from carrying on business at all. The obvious way of providing for his case is to include in the Order the retail business of sales by auction. If that were done and he did not comply with the Order he would be committing

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an offence. It would, in my opinion, be to stretch the Order unduly if we were to hold that the respondent comes within its scope whenever he sells by auction any article which any one of the mentioned tradesmen is in the habit of selling by private bargain.

AVORY J. I agree.

Appeal dismissed.

Solicitors for appellant : *Torr & Co.*

Solicitors for respondent : *Tarry, Sherlock & King, for Reuben Cohen, Stockton-on-Tees.*

J. S. H.

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[IN THE COURT OF APPEAL.]

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[1920. R. 1271.]

Emergency Legislation—Landlord and Tenant—Quarterly Tenancy—Tenant adjudicated Bankrupt—Disclaimer of Tenancy by Official Receiver—Determination of Tenancy—Statutory Tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 5, sub-s. 1; s. 15, sub-s. 1.

The effect of a disclaimer by a trustee in bankruptcy of a bankrupt's interest in a quarterly tenancy is to deprive the tenant of any further interest in the demised premises and, consequently, he is debarred from relying on a statutory tenancy therein under the Increase of Rent Acts.

In 1916 a "dwelling-house" within the meaning of the Increase of Rent Acts was by agreement in writing let by the plaintiff to the defendant on a quarterly tenancy from June 24, 1916, subject to a quarter's notice, at a yearly rent of 60*l.*, payable quarterly. The rent was afterwards increased to 65*l.* In 1920 the defendant was adjudicated bankrupt and the Official Receiver disclaimed the tenancy, whereupon the plaintiff, after the Increase of Rent, &c. (Restrictions), Act, 1920, came into force, brought this action for recovery of possession of the demised premises on the ground that the tenancy had expired by reason of the disclaimer:—

Held, that the plaintiff was entitled to possession.

Decision of Roche J. affirmed.

APPEAL from an order of Roche J.

By an agreement in writing dated September 21, 1916, the plaintiff agreed to let and the defendant agreed to take

the dwelling-house and shop No. 2, Sunnyside, The Drive, Hendon, for the term of three months from June 24, 1916, and thereafter from quarter to quarter, subject to a quarter's notice on either side, at the yearly rent of 60*l.* payable quarterly. In March, 1917, the rent was raised to 65*l.*

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On April 13, 1920, a receiving order was obtained against the defendant by a petitioning creditor, and on April 30, 1920, he was adjudicated bankrupt.

On May 27, 1920, the Official Receiver gave notice of his intention to disclaim "the agreement dated the 21st day of September, 1916, whereby the premises known as 2 Sunnyside, Hendon, in the County of Middlesex were let to the above-named bankrupt on a quarterly tenancy at a yearly rent of 60*l.*"

The defendant continued in occupation of the premises after the order of adjudication, and on July 7, 1920, sent to the plaintiff a cheque for 16*l.* 15*s.*, being the quarter's rent due on June 24, 1920. The plaintiff refused to accept the cheque and returned it to the defendant's solicitors.

On July 22, the plaintiff issued his writ in the action, claiming possession of the premises on the ground that the term created by the agreement of September 21, 1916, had expired (by reason of the disclaimer).

At the trial of the action as a short cause on October 14, Roche J. held that the defendant's tenancy of the premises was determined by the notice of disclaimer, and that the defendant had no statutory tenancy under the Increase of Rent Acts, 1915-1920; and gave judgment for the plaintiff.

The defendant appealed.

W. Grist Hawtin for the appellant. The decision was wrong, because the appellant has a statutory tenancy created by the Increase of Rent Acts. From June 24, 1916, to April 30, 1920, when he was adjudicated bankrupt, he was a quarterly tenant, having acquired a statutory tenancy under the Increase of Rent Acts then in force. The effect of the adjudication was to vest the property of the bankrupt, including his quarterly tenancy, in the Official Receiver as trustee in his

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bankruptcy, who, however, allowed the bankrupt to remain in possession of the premises: Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 53, sub-s. 1. The effect of the disclaimer was to determine as from May 27, 1920, the rights, interests and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and to discharge the Official Receiver from all personal liability in respect of the property disclaimed as from the date when the property vested in him: Bankruptcy Act, 1914, s. 54, sub-s. 2. Nevertheless the bankrupt, by continuing in possession, and paying the rent, as he has done up to the present time, has continued the statutory tenancy previously acquired: Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15, sub-s. 1. (1) Moreover, by continuing in possession and paying rent after adjudication the premises are "after acquired property" within the meaning of s. 47, sub-s. 1, of the Bankruptcy Act, 1914, which the bankrupt can hold against all the world, except when the trustee intervenes, but that intervention has not taken place.

Assuming that the effect of the disclaimer was to make the bankrupt a trespasser, s. 5 of the Rent Act of 1920 is explicit that no order for the recovery of possession of the premises shall be made unless certain events have happened, but none of those conditions applies to the present case. In *Remon v. City of London Real Property Co.* (2), the plaintiff's tenancy had expired and he was a trespasser after June 24, 1920,

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5, sub-s. 1:—"No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given, unless" (then follow certain specific events, none of which had occurred in the case now reported).

Sect. 15, sub-s. 1:—"A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act

applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession of the dwelling-house only on giving such notice as would have been required under the original contract of tenancy, or, if no notice would have been so required, on giving not less than three months' notice. . . ."

(2) [1921] 1 K. B. 49.

but it was held that, when the present Rent Restrictions Act came into force on July 2, 1920, he, by virtue of that statute, and his previous occupancy, had acquired a statutory tenancy which protected him under s. 5 thereof from ejectment. It is submitted that the ratio decidendi of that case applies to the present case, and the appeal should be allowed.

[He also referred to *Barton v. Fincham* (1), *Lord Hylton v. Heal* (2) and *Hunt v. Bliss*. (3)]

Tindale Davis for the respondent was not called upon to argue.

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LORD STERNDALÉ M.R. This is an appeal from a decision of Roche J. who has made an order for recovery of possession. On September 23, 1916, there was an agreement executed by which the defendant became tenant to the plaintiff of a dwelling-house and shop at Hendon for the term of three months from June 24, 1916, and thereafter from quarter to quarter at a rent of 60*l.* a year, increased in 1920 to 65*l.* a year. On April 13, 1920, a receiving order was made against the defendant. On April 30 he was adjudicated bankrupt, and by virtue of that adjudication the whole of his property has become vested by law in the Official Receiver as trustee. From that moment the defendant had no beneficial interest in the property of any kind. The defendant has remained in possession of the premises since the adjudication and has tendered a cheque for rent, but the landlord has refused to accept it. The defendant contends that he is entitled to remain in possession under s. 5 of the Increase of Rent, &c. (Restrictions), Act, 1920, as having a statutory tenancy. Roche J. has held that the provisions of that section have no application to the state of things which here exists, and I entirely agree. It is admitted that there is no authority directly in point, but I go further and say that, in my opinion, the authorities which have been referred to by counsel for the appellant have no bearing upon the point. The decisions

(1) Ante p. 291; 37 Times L. R. 386.

(2) Ante p. 438.

(3) [1919] W. N. 331; 36 Times L. R. 74.

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as to holding over have no application, neither have the decisions as to the position of a sub-tenant. I base my judgment simply upon this, that where by statute the interest of the tenant of a house has been entirely divested or taken away from him and vested in his trustee by operation of law, the tenant has no more interest in the property than any passer-by in the street, and has no right to intervene. The fact that the trustee disclaims the lease in my opinion makes no difference. The order of the learned judge was quite right, and the appeal will be dismissed with costs.

SCRUTTON L.J. It seems to me that the persons responsible for the drafting of this last statute have shown a great lack of consideration of the results of various events which may be expected to happen in some cases of tenancy. I am amazed that it never appears to have struck them to consider what was to occur in the case of bankruptcy. There is nothing in the Act to show what is to happen in the case of a tenant becoming bankrupt. Questions may arise as to what would happen in similar circumstances in the case of a sub-tenant, but it is not necessary now to consider that point.

The difficulty in my view in the present case, is what limitation are we to introduce into the express words in sub-s. 1 of s. 5 of the Act : "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless . . ." ? Those words are followed by a series of conditions no one of which applies to the present case. Yet I think it is clear that in this case, such an order can be made. In *Barton v. Fincham* (1) the Court of Appeal held that these words imposed restrictions on the jurisdiction of the Court to make an order for possession. In *Remon v. City of London Real Property Co.* (2) the Court of Appeal held that the words in s. 15 "a tenant who by virtue of the provisions of this Act retains possession" referred to a tenant, who though not a tenant in the legal sense at the time of ejectment, was a statutory "tenant," because he was

(1) Ante p. 291.

(2) [1921] 1 K. B. 49.

protected from ejectment by the restrictions of s. 5. I think it is clear that the order here made was a judgment for the recovery of possession. In my opinion where the right to actual possession of the premises has been transferred to the landlord by the disclaimer of the person entitled to such right the former tenant does not become a statutory tenant by reason of the trustee having disclaimed the lease. Sect. 5 of the statute has in such a case no application to the defendant. Suppose for example that the tenant had assigned his interest voluntarily, could he be said to be still a statutory tenant? I expressly reserve that question for future consideration. But where, as here, the tenant has lost all his interest by the action of a person to whom the law has entrusted the power of making a disclaimer, I fail to see how it can be said that the conditions of a statutory tenancy have been fulfilled.

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Scrutton L.J.

YOUNGER L.J. I am of the same opinion. The facts of this case are perfectly simple. No persons are concerned, remotely or otherwise, except the bankrupt, the Official Receiver, as trustee in his bankruptcy, and the landlord. The bankrupt was the original tenant, and not a lessee by assignment. He was adjudicated bankrupt on April 30, 1920, and thereupon his interest in this house vested in the Official Receiver as his trustee in bankruptcy. The trustee has disclaimed the lease. There is no provision in the Bankruptcy Act, 1914, revesting the lease or any portion of the lease in the bankrupt upon such disclaimer. The trustee might have done one of two things. Had the lease been valuable he might have sold it. Because to him it was of no value he disclaimed it. The effect of the disclaimer was that the whole of the bankrupt's former interest in the property revested to the lessor, just as it would have passed to an assignee had the trustee sold the lease to him. What then is the interest of the bankrupt in the property? The answer is that he has none at all. It ceased and determined immediately upon his adjudication, and it is not suggested that any new interest has been created in him either by arrangement with

C. A. the trustee prior to the disclaimer or with the landlord after it.
 1921 The result therefore is that the bankrupt having been and
 REEVES remained divested of all his interest in the property, the
 v. Increase of Rent, &c. (Restrictions), Act, 1920, has no
 DAVIES. application to the case at all.

Appeal dismissed.

Solicitors for appellant: *Peet & Manduell.*

Solicitors for respondent: *Tucker & Co.*

W. I. C.

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[IN THE COURT OF APPEAL.]

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Feb. 11, 14, COMMISSIONERS OF INLAND REVENUE v. SANSOM.
 16.

*Revenue—Super Tax—One-man Company—No Declarations of Dividends—
 Loans to principal Shareholder without Interest or Security—Income
 —Questions of Fact for Commissioners—Case stated—Findings of
 Commissioners—Remitting Case for further Findings.*

In 1911 J. S. sold his business as a going concern to a private company, J. S., Ltd. The capital was 2500 shares of 10l. each, of which 2499 shares were held by S. and one share by H., a former employee, who subsequently in May, 1917, sold that one share to S.'s daughter. S. was the sole governing director, and the whole direction, control, and management of the business and affairs of the company were in his hands. By its memorandum, the company had power to lend money to such persons and on such terms as it should think fit. After the outbreak of war the company made large profits. No dividends were ever declared, but up to 1916 the accumulated profits were put into the business. During 1916 the company made loans to S. amounting to 3907l. 3s. 3d., and during 1917, up to the taxable year ended April 5, 1917, to the amount of 2624l. 7s. 6d. These loans were made without either interest or security, and there was no evidence of them beyond entries in the company's ledger. S. purchased war stock in his own name with the proceeds of the loans. In September, 1917, a resolution was passed to wind up the company. Between April 6, 1917, and the winding up further loans were made to S. In the winding up these loans were treated by the liquidator as part of the company's assets, S. not being asked to repay them, but accounting for them in receiving his share of the assets on distribution. S. was assessed to super tax on the loans made and appealed to the Commissioners. The Commissioners found that the company was a properly constituted legal entity, with power to make loans to such persons and upon such terms as it should think fit; that

it did make such loans to S. ; and that such loans did not form part of S.'s income for the purposes of super tax, and they accordingly discharged the assessment. On appeal by the Crown, Rowlatt J., on a case stated, made an order that the case should be remitted to the Commissioners to determine (a) whether the company in point of truth and fact carried on the business ; or whether S. carried it on. (b) Whether, if the company carried on the business, it did so as agent for S. ; or whether it carried it on on its own behalf for the benefit of the corporators. On appeal :—

Held, that the findings of the Commissioners being on questions of fact were conclusive and involved the negating of both the questions directed to be put to them, and therefore that it would be wrong to send the case back to them to answer the questions.

Held, therefore, that the order remitting the case to the Commissioners must be discharged and their decision affirmed.

Position occupied by the governing director of a private company in which he holds substantially the whole of the share capital towards the company as regards transactions between himself and the company, discussed by Younger L.J.

Decision of Rowlatt J. reversed.

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APPEAL from a decision of Rowlatt J. on a case stated under the Finance (1909–10) Act, 1910, s. 72, sub-s. 6, and the Taxes Management Act, 1880, s. 59, by the Commissioners for the Special Purposes of the Income Tax Acts.

The case stated was as follows :

“ 1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held on January 7, 1919, for the purpose of hearing appeals, John Sansom, hereinafter called the respondent (being the appellant before us), appealed against an assessment to super tax in the sum of 8300*l.* for the year ending April 5, 1918, made upon him under the provisions of the Finance (1909–10) Act, 1910, and subsequent enactments.

“ 2. The following facts were admitted or proved :—

“ The respondent originally carried on business as a timber merchant, and on November 1, 1911, sold his business as a going concern to a company—John Sansom, *Ld.* (hereinafter called the company), which was formed to purchase the business. Part of the consideration for the sale was the sum of 25,000*l.*, to be satisfied by the allotment to the respondent or his nominees of 2500 *10l.* fully paid shares in the company. The company is a private one and its capital since its incorporation has been 25,000*l.* divided

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into 2500 shares of 10*l.* each, of which the respondent has held 2499 and a Mr. Hime has held one. Evidence shows that the respondent gave this one share to Mr. Hime, who had previously been in his employ. The respondent and Mr. Hime were thus the only shareholders.

“ With the exception of this one share given to Mr. Hime, the respondent was the sole shareholder in the company, the governing director, and in fact the only director, so that the whole direction, control and management of the business and affairs of the company were in his hands. The wide powers given to the respondent appear on reference to the articles of association of the company. The memorandum and articles of association of the company are hereto annexed (marked A) and form part of this case.

“ Under the said memorandum of association, the company had power to lend money to such persons and upon such terms as the company should think fit. The company was comparatively successful in trading for the three years up to 1914, but, after the outbreak of the war, it made large profits. No dividends were ever declared, but the profits were accumulated, and, up to 1916, used for the purposes of the business. On April 30, 1916, and April 30, 1917, the balances to profit and loss accounts in the balance sheets of the company were, respectively, 9898*l.* and 12,416*l.* For each of the years to April 30, 1916 and 1917, however, the profits were subject to deduction in respect of excess profits duty, as stated in accounts in auditor's report. The amounts due for excess profits duty were respectively 2733*l.* 12*s.* and 2057*l.* 6*s.* 8*d.* During 1916–17 the company made what are described in the balance sheets as ‘loans or advances’ to the respondent. These ‘loans or advances’ were made without interest and without any security, nor was there any evidence thereon beyond debit entries against the respondent in the ledger of the company. The ‘loans or advances’ were in varying sums, amounting in all to 6531*l.* 10*s.* 9*d.* The balance sheet of the company as at April 30, 1917, shows cash advanced to the respondent, 7607*l.* 11*s.* 10*d.*, and the above sum, 6531*l.* 10*s.* 9*d.*, is the

portion of the said 7607*l.* 11*s.* 10*d.* paid to the respondent up to April 5, the end of the fiscal year. The said sum of 6531*l.* 10*s.* 9*d.* was made up as follows :

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<i>Date of payment.</i>				<i>Amount.</i>			INLAND REVENUE COMMISS- SIONERS v. SANSOM.
				£	s.	d.	
September 4, 1916	..	..	..	1009	3	3	
„ 23, 1916	..	..	..	2898	0	0	
January 29, 1917	..	..	..	1235	0	0	
February 12, 1917	..	..	..	380	0	0	
March 28, 1917	..	..	..	1009	7	6	
				£6531	10	9	

“ Evidence was given that the respondent on each of the above dates asked the secretary of the company to draw a cheque for the amount set opposite to the date. The respondent purchased War Stock in his own name with the proceeds of the cheques. Copies of the accounts (including balance sheets) of the company from 1911 to September 30, 1917, are hereto annexed and form part of this case.

“ In the first year of the company's trading there had been similar ‘ loans or advances ’ on similar terms of 914*l.* to the respondent, but this had been paid off soon afterwards. There were no ‘ loans or advances ’ between 1912 and 1916. In 1916, the respondent had the idea of selling the business, assets, etc., of the company, and eventually in September, 1917, a resolution was passed to wind up the company voluntarily, and the business and assets of the company were sold. Between April, 1916, and April, 1917, in view of the intention of the respondent to discontinue the business, very little fresh stock was purchased and the existing stock was sold off as occasion arose without it being replenished. During that period, also, certain of the property belonging to the company was sold. Between April, 1917, and the winding up of the company further ‘ loans or advances ’ were made to the respondent. In winding up the affairs of the company the liquidator treated these ‘ loans or advances ’ as part of the assets of the company, though the respondent was not called upon to repay them, they

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being taken into account when the respondent received his share of the assets. No 'loans or advances' were ever made to Mr. Hime. The relations between the respondent and Mr. Hime had been for many years very strained, and in May, 1917, Mr. Hime sold his share to the respondent's daughter.

" 3. For the year 1917-18 the respondent made a return to the Special Commissioners of Income Tax for the purposes of super tax in the sum of 945*l.*, but such return was not accepted as representing his measure of liability for that year by the Commissioners to whom fell the duty of considering his liability to or exemption from super tax. In their view the loans and advances which he had received were, in fact, not 'loans or advances' by the company but constituted an income received by the respondent from the company, and they, therefore, under the power conferred upon them by statute, assessed the respondent in the sum of 8300*l.* as set forth in the opening paragraph of this case.

" 4. On behalf of the respondent it was contended (*inter alia*) that the company was a properly constituted limited company having power under its memorandum of association to lend money to such persons and upon such terms as it should think fit, and that it exercised this power in making these 'loans or advances' to the respondent: that the 'loans or advances' being, in fact, 'loans' could not be treated as a part of the respondent's income for the purposes of super tax, and, alternatively, that even if the 'loans or advances' were not, in fact, loans they could not be included in the computation of the respondent's total income as receipts from the company as they had not come to the respondent from the company in the form of dividends.

" 5. On behalf of the Commissioners of Inland Revenue it was contended that, in the special circumstances of the case, (1.) the company must be regarded as a sham, simulacrum, or cloak, and that its business must be regarded as the business of the respondent, in which case, for super tax purposes, the profits of the business, whether distributed or not by way of dividend, were the respondent's income,

(2.) alternatively, that the 'loans or advances' were not genuine loans, but were, in fact, distributions of the profits of the company to the respondent, notwithstanding that the usual formulæ of declaring and paying dividends had not been carried out in each, or any case, when the 'loans or advances' had been made (the formulæ being unnecessary in the special circumstances), and, accordingly, that the 'loans or advances' constituted income for super tax purposes.

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"6. We the Commissioners who heard the appeal, reserved our decision, and having considered the facts and arguments in this case, were of opinion:—

"(a) that the company was a properly constituted legal entity ;

"(b) that it had power to make loans to such persons and upon such terms as it should think fit ;

"(c) that it did make such loans to the respondent, and

"(d) that such loans do not form a part of the respondent's income for the purposes of the super tax ;

"(e) that as a result the respondent was, in our opinion, not liable to super tax for the year under appeal, and we accordingly discharged the assessment."

The Commissioners of Inland Revenue appealed. The appeal was heard before Rowlatt J. on December 18, 1919, who made an order remitting the case to the Special Commissioners to find "Accepting the view that the company was a properly constituted entity, and accepting the view that it had power to make loans to such persons and upon such terms as it should think fit, whether in point of truth and in fact the company did carry on this business or whether the respondent really carried it on to the exclusion of the company ; whether if the company did carry on the business it carried on the business as agent for the respondent who is to be regarded as a principal standing outside the company ; whether the company carried on the business on its own behalf and for the benefit of the corporators which is practically the respondent inside the company."

The respondent having died since the making of the

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order, his executors appealed against the remission of the case to the Commissioners and asked that their finding should be affirmed.

The appeal was heard on February 11, 14, 16, 1921.

A. M. Latter and *H. P. Glover* for the appellants. The company here is a separate entity: *Salomon v. Salomon & Co.* (1) It has bought and paid for Sansom's business and is distinct from him. There are therefore no further facts beyond those found by the Commissioners to be found. The principles laid down in *Salomon v. Salomon & Co.* (1) have not been affected by the decision in *Daimler Co. v. Continental Tyre and Rubber Co.* (2) As long as there is a finding that the property is the property of the company the question of agency disappears. The decision in *Apthorpe v. Peter Schoenhofen Brewing Co.* (3) turned on the fact that the property of the American company was owned by the English company. This was pointed out by Phillimore J. in *Kodak, Ltd. v. Clark.* (4) In *Gramophone and Typewriter, Ltd. v. Stanley* (5) it was held that the fact that an English company carrying on business in the United Kingdom was the holder of all the shares in a German company did not make the business of the German company the business of the English company, so as to render the English company liable for income tax. So here the fact that Sansom held all the shares except one in the company does not make him liable to super tax in respect of the profits of the company: *Inland Revenue Commissioners v. Blott.* (6) It is submitted therefore that there is nothing upon which the case can be sent back to the Commissioners.

Sir Ernest Pollock S.-G. and *R. P. Hills* for the respondents. Rowlatt J. was right in the course which he adopted. He acted under s. 59 (c) of the Taxes Management Act, 1880, and merely indicated that he desired a further finding in order to enable him to exercise his discretion. The Court

(1) [1897] A. C. 22.

(2) [1916] 2 A. C. 307.

(3) (1899) 4 Tax Cas. 41.

(4) [1902] 2 K. B. 450; affirmed

[1903] 1 K. B. 505.

(5) [1908] 2 K. B. 89.

(6) [1920] 1 K. B. 114.

will therefore be slow to interfere with him in the exercise of his discretion. *Salomon v. Salomon & Co.* (1) is not conclusive on the point in this case. *St. Louis Breweries v. Apthorpe* (2); *United States Brewing Co. v. Apthorpe* (3) and *Apthorpe v. Peter Schoenhofen Brewing Co.* (4) show that a business legally vested in a company in America may be treated for taxation purposes as the business of a company in England, either as being in fact the business of the latter or because the American company is to be treated as the agent of the English company for the purpose of carrying on the business in America. In the *Gramophone Case* (5) the Court of Appeal indicated that although there may be a legal entity that does not conclude the matter for all purposes. The cases show that there may be such a relation between one entity and another, whether two companies or a company and an individual, that the question arises whether the one is carrying on the business by the direction of the other so as to be liable to tax: *Rex v. Bloomsbury Income Tax Commissioners.* (6) The *St. Louis' Case* (2) is still good law. It is possible for a company here to be carrying on the business of a company in America, and a similar relation might exist in the case of an individual here. It is submitted the identity of Sansom has not become merged in the entity of the company. He still stands as an individual outside the company—the person who owns the shares and the person to whom the loans were made—and the question remains whether what was done was done inside or outside the company. The question whether the company held the property for a principal has never been put to or answered by the Commissioners. The Commissioners appear to have considered that the matter was concluded by *Salomon's Case.* (1)

A. M. Latter was not called upon to reply.

LORD STERNDALÉ M.R. This appeal from Rowlatt J. arises about what I may perhaps call a pronounced case of a

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(1) [1897] A. C. 22.

(2) (1898) 4 Tax Cas. 111.

(3) (1898) 4 Tax Cas. 17.

(4) (1899) 4 Tax Cas. 41.

(5) [1908] 2 K. B. 89.

(6) [1915] 3 K. B. 768.

C. A. one-man company. A Mr. Sansom who had been carrying
 1921 on a timber business formed his business into a company
 INLAND in 1911. He did not so form it in order to escape any
 REVENUE liability to super tax, because at that time the nature of the
 COMMISSIONERS business was such that I do not suppose the idea of his having
 v. to pay super tax had ever entered into his head. It was a
 SANSOM. very small business. He did not do it to defraud his creditors,
 Lord Sterndale but he did it, I take it, for the ordinary reason which actuates
 M.R. a man in forming his business into a company—namely,
 that he might have the advantage of the trading of the
 company in which he held the greater part of the shares and
 received the greater part of the profits in dividends as they
 were distributed, and might obtain that advantage without
 being personally liable on the contracts which were made
 to earn those profits.

Now the great reason why so many people form their
 businesses into limited companies and others invest their
 money in them is in order that they may be under no personal
 liability in respect of the transactions of those companies,
 and that is a perfectly legitimate object, as was decided by
 the House of Lords in *Salomon v. Salomon & Co.* (1)

The business, as I say, was at first a very small one, but
 like many other businesses it profited from the war, and it
 earned very considerable profits during its continuance.
 The capital of the company was 2500 10l. shares. Of those,
 2499 were allotted to Mr. Sansom as the purchase money, and
 one was held by a Mr. Hime, who at that time was a friend
 of Mr. Sansom's. There is nothing whatever to show that
 he was a nominee of Mr. Sansom in the sense that he held
 the share for him, and in fact he became, at a later period,
 very antagonistic to, and on bad terms with, Mr. Sansom,
 and afterwards transferred this share to Mr. Sansom's
 daughter. That however is immaterial. The company had
 power by its memorandum to lend money to such persons and
 upon such terms as it should think fit, and in particular to
 customers of and others having dealings with the company
 and to receive money on deposit, and so on. By the articles

Mr. Sansom was made the governing director of the company and had the fullest possible powers of managing its business. The company, as I say, after the war, began to make very much larger profits than it had done before. It never declared any dividends, but the profits were accumulated, and up to 1916, as found by the Commissioners, were used for the purposes of the business. On April 30, 1916, and April 30, 1917, the balances to the credit of profit and loss were 9898*l.* and 12,416*l.* respectively—not the profits of those particular years but the accumulated profits—and excess profits duty was paid upon those profits, the amounts being respectively 2733*l.* and 2057*l.* As I have said, no dividends were ever distributed, but the company made what were entered in the balance sheets as loans or advances to Mr. Sansom. They were made without interest and without security, and the money according to the finding of the Commissioners was invested by him in War Stock. There had been, in the early days of the trading, loans to the extent of between 900*l.* and 1000*l.* to Mr. Sansom, and those had been paid off. But between 1912 and 1916 there had not been any such loans or advances. Eventually the company was wound up, and in the winding up Mr. Sansom, who would of course be entitled to the greater part of the assets of the company and to the accumulated profits, was debited with these sums as loans. That of course did not make any practical difference, because as to all intents and purposes the whole of the assets were received by him it did not matter whether or not he was debited with these loans. I think it only needs the statement of those facts to show that anybody would approach the matter with a very considerable amount of suspicion, and I think the *prima facie* tendency of anybody's mind would be to say: "This transaction of loans or advances without security and without interest is a mere fiction. It is all nonsense, and the real fact is that Mr. Sansom was receiving under the guise of loans or advances the profits which were made by the company which he controlled and in which he held practically the whole of the shares." That, I think, would have been one's impression

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off-hand. And that no doubt was part of but only a part of the case which was made before the Commissioners. Now the Commissioners have found that these were genuine loans, that they were loans by the company to Mr. Sansom, and that they were not mere pretences to hide the fact that he was receiving the profits of the company. They saw him ; he was examined before them, and I suppose they had before them all Mr. Sansom's and the company's books and all the materials that could be provided. They are business men who I have no doubt have heard of one-man companies and are perfectly familiar with the questions which arise upon them, and they were certainly as well fitted as we are to come to a conclusion of fact in the matter. They did come to that conclusion. I shall allude to the particular terms of their findings later on, but they did come to that finding. It seems to me that for reasons which I shall give this really puts an end to this case, which, in my opinion, depends entirely upon questions of fact.

We have been referred to a great number of cases in which it has been held that certain English companies were liable to the Inland Revenue Commissioners in respect of businesses of companies carried on abroad. I do not propose to go through those cases or to discuss the grounds upon which they were decided ; but there certainly is this feature which is, I think, common to them all—namely, that there was a finding of the Commissioners to the effect that the business sought to be charged was the business of the English company. I think I am right in saying that in none of the cases was there a finding to the opposite effect. And there are cases in which where the taxpayer had been found chargeable by the Commissioners by reason of his holding the whole interest in a company, the Court has set aside that finding on the ground that the mere holding of all the shares in the company was not sufficient to make him liable. An appeal was made to us by the Solicitor-General, and I think also by Mr. Hills, not to lay down the principle that when once you have what I may call a *Salomon v. Salomon* case, no further inquiry can be made, and that it never can be possible

to make any person liable to taxation in respect of the business of the company.

Now I never had the slightest intention of laying down any such principle, and I do not think either of my brothers has any such intention, at any rate I certainly have not. There may, as has been said by Lord Cozens-Hardy M.R., be a position such that although there is a legal entity within the principle of *Salomon v. Salomon & Co.* (1), that legal entity may be acting as the agent of an individual and may really be doing his business and not its own at all. Apart from the technical question of agency it is difficult to see how that could be, but it is conceivable. Therefore the mere fact that the case is one which falls within *Salomon v. Salomon & Co.* (1) is not of itself conclusive. It goes some considerable way, but it is not conclusive.

Rowlatt J. thought that this case ought to go back to the Commissioners in order that they might make a finding on the following questions: [His Lordship read the questions and continued:] Now I do not think that in those terms those questions were put to the Commissioners, and I cannot help seeing that the object of the Crown—I do not say it is an improper object; it is quite a proper object—is, that by putting the questions in a somewhat different form they may obtain a reversal of the finding of the Commissioners that these were bona fide transactions. If there was anything to be found in the answers of the Commissioners in the case stated to show they had overlooked this point or that these questions might be found in favour of the Crown consistently with the findings at which the Commissioners did in fact arrive, then I should agree that the case ought to go back. But in my opinion there is nothing of the sort here. The Commissioners set out the facts which I have mentioned, the constitution of the company, the fact of previous loans having been made, the fact of the company having paid for the business by fully paid shares in the way described and all other relevant facts, and then they say, "On behalf of the

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C. A. Commissioners of Inland Revenue it is contended that, in
 1921 the special circumstances of the case (1.) the company
 INLAND must be regarded as a sham, simulacrum, or cloak,
 REVENUE and that its business must be regarded as the business
 COMMIS- of the respondent." I am inclined to think that that
 SIONERS v. is all one contention—the company must be regarded
 SANSOM. as a sham, simulacrum, or cloak, and therefore that
 Lord Sterndale this business must be regarded as the business of
 M.R. Mr. Sansom. Then the second contention is, "Alternatively,
 that 'the loans or advances' were not genuine loans, but
 were, in fact, distributions of the profits of the company to
 the respondent notwithstanding that the usual formulæ of
 declaring and paying dividends had not been carried out in
 each, or any, case, when the 'loans or advances' had been
 made." In answer to that they found this. "We, the
 Commissioners who heard the appeal, reserved our decision,
 and having considered the facts and arguments in this case"—
 and I may add having seen and heard the witnesses in the
 case—"were of opinion : (a) that the company was a properly
 constituted legal entity," and my impression is that by that
 they meant to negative the whole of the first contention,
 but I agree that it is not conclusive—that that finding does
 not necessarily do so, because although the company might
 be a properly constituted legal entity still its business
 might be regarded as the business of Mr. Sansom. If the
 findings had stopped there I might have thought it was right
 to ask the Commissioners to put their finding on that point
 into more definite terms. But the findings go on : "That
 it had power to make loans to such persons and upon such
 terms as it should think fit." That is merely quoting the
 memorandum of association. Now these are the important
 findings : "(c) That it did make such loans to the respondent,
 and (d) that such loans do not form a part of the respondent's
 income for the purposes of the super tax."

Now that appears to me, as I have said before, to be
 conclusive, because it seems to me to involve negating
 both the propositions which Rowlatt J. thinks should be
 put to the Commissioners. If the company were merely

carrying on the business as Mr. Sansom's business and not as its own it would not be possible for it to make genuine loans to Mr. Sansom. You cannot make a loan to a man out of his own business, and therefore that finding seems to me necessarily to negative the first question which the learned judge wishes to put.

The second question directed to be put is whether if the company were really carrying on a business of its own, and not a business of Mr. Sansom's, it was so carrying it on as an agent for Mr. Sansom and not on its own behalf. That again seems to me to be conclusively negated by the finding as to these being genuine loans. An agent cannot make a loan to a principal out of the principal's assets; it is not conceivable; it cannot be done. And therefore the finding as it stands is to my mind conclusive on all the questions that were put or which it is suggested might be put and ought to be put to the Commissioners. That being so it would, I think, be wrong to send the case back to the Commissioners to put to them in another form matters which they have already decided in the hope that they might come to a different conclusion. I think therefore that this appeal should be allowed and that the decision of the Commissioners should be upheld.

SCRUTTON L.J. This is an appeal against a decision of Rowlatt J. sending back a case to the Commissioners to answer certain questions in respect of the assessment of a Mr. Sansom to super tax for the year ending April 5, 1918. Mr. Sansom had had a small timber business which he had turned into a company of which he was governing director, all the shares except one being transferred to himself as the purchase price, the one share being given to a Mr. Hime who, however, appears not to have held it as a nominee bound to do what he was told, but to have held it as a quarrelsome and independent shareholder, who ultimately sold his share to Mr. Sansom's daughter. During the latter part of the war this company made large profits, and what happened was that the company never declared a dividend,

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C. A. but that Mr. Sansom the governing director instructed the
1921 secretary to make cheques payable to him, Mr. Sansom, which
INLAND were entered in the company's books as loans, on which no
REVENUE interest was agreed to be paid or paid, and for which there
COMMIS- was no security, and Mr. Sansom, on receiving these sums,
SIONERS v. invested them in War Loan in his own name. Thereupon the
SANSOM. Crown assessed Mr. Sansom to super tax, taking the sums he
Scrutton L.J. received by way of loan as alleged as being profits received by
him from the company. That of course would be simply a
case of a man resident in England receiving profits. That
assessment came before the Commissioners, who had to
decide on this point whether these were genuine loans or
whether they were merely a disguise for profits of the company
received by the shareholder. Now personally I feel that
I should have approached the consideration of that question
with the strongest presumption that they were really profits
and not loans; the whole thing looks extremely suspicious.
But the Commissioners saw Mr. Sansom, they heard him
cross-examined, they heard other witnesses, they heard all
that could be said on either side, and they heard that in the
earlier years of the company a similar loan appeared in the
books which had been repaid by Mr. Sansom to the company,
and after hearing all the evidence they found that these
were genuine loans. Now, whatever I might have thought,
not having seen the witnesses, I do not see how I can possibly
interfere with a finding of the Commissioners, who are judges
of fact, and who have seen Mr. Sansom, that these were
genuine loans. And therefore I can see no reason for sending
the case back, on that part of the case, to the Commissioners.

But of course the case does not stop there, because putting
aside altogether the question of the loans having been made,
and assuming that the money had remained with John
Sansom, Ltd., undivided, there might still have been the
question, the question which has been fought backwards
and forwards in various shapes ever since I have known
anything about the income tax law, which I am afraid
goes back nearly to the day when I was called, between
the skilled counsel for the Crown and skilled counsel who

protect the interests of the taxpayer. That question is whether it can be said that the business which is being carried on by a company is really the business of an individual and consequently the profits made by that company are really his profits and he is assessable in respect of them. It first arose in connection with foreign businesses and foreign interests for this reason: If a person were resident in England and carried on a trade partly in England and partly abroad he was assessed on the whole profits of the joint business, here and abroad. If what he had was a foreign security or a foreign possession he was not assessed on the whole profits but only on such part of them as he received in England, and if he left part of the profits of his foreign security or foreign possession abroad he was not assessed on that part of them. And so in *Colquhoun v. Brooks* (1), which was one of the prominent early landmarks in the struggle, Mr. Brooks, a partner in a firm carrying on business in Australia, succeeded in establishing that he was only liable to pay on such part of the profits of the firm in Australia as he brought home to England, his interest in the partnership being a foreign security or a foreign possession. And Lord Herschell in that case said in the House of Lords that if he had turned his partnership interest into a company and had represented his interest by shares in the company it would have been quite clear that it was a foreign security or foreign possession. In 1893, *Wright and Cave JJ.* in the *Bartholomay Brewing Co. (of Rochester) v. Wyatt* (2) followed the decision in *Colquhoun v. Brooks* (1) and again held that where the interest was shares in a foreign company it was only what was received in England and not the whole profits that were taxable. So far the taxpayer was winning. Then came his set-back when *San Paulo (Brazilian) Ry. Co. v. Carter* (3) went to the House of Lords in 1896. In that case it was held by the House of Lords that where an English company was carrying on a railway in Brazil, although it was carrying on business partly abroad and partly here, yet it

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(1) (1889) 14 App. Cas. 493.

(2) [1893] 2 Q. B. 499.

(3) [1896] A. C. 31.

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was one indivisible business, and that the company was taxable on the whole of the profits though they were not brought home to England. Then followed a series of American brewery cases in which English companies, resident in England, holding nearly all, and sometimes all, the shares in American breweries, and sometimes purporting to own all the assets which the American companies held—although it was never quite clear how they did so—claimed only to pay income tax on such part of the American brewery profits as were remitted to England. In three of those cases—the *Peter Schoenhofen Case* (1), the *St. Louis Case* (2), and the *United States Case* (3)—the Commissioners found as a fact in each case that the head and seat of the government of the American company were in England, and that the business carried on in America was the business of the English company. The *Peter Schoenhofen Case* (1) went to the Court of Appeal, and the Court there held themselves bound by the finding of fact by the Commissioners that the business carried on in America was the business of the English company. In one or two of those cases the Court made certain remarks as to the taxpayer being stated out of Court by the Commissioners, the result of which was that in two or three of the subsequent cases, particularly in the *Kodak Case* (4) and in the *Gramophone Case* (5), the Commissioners set out in the cases stated an enormous number of facts and as far as they could abstained from making any findings, throwing the whole set of the facts at the head of the Court. In both of those two cases—the *Kodak Case* (4), where the English company owned ninety-eight per cent. of the foreign company's shares, and the *Gramophone Case* (5), where they owned the whole of the foreign company's shares—the Court of Appeal held that the profits of the foreign company were not the profits of the English company, and the English company was not carrying on the business of the foreign company.

(1) 4 Tax Cas. 41.

(3) 4 Tax Cas. 17.

(2) 4 Tax Cas. 111.

(4) [1903] 1 K. B. 505.

(5) [1908] 2 K. B. 89.

Now putting aside altogether the question of the loans to Mr. Sansom and assuming that he never received them the question we have then to determine in this case arises in this way. The Crown say to Mr. Sansom, "The business of John Sansom, Ltd., is your business, and therefore although you have not received the profits the Crown can assess you to super tax; there is no need for the Crown to assess you to income tax because the company pays that tax; but inasmuch as the company does not pay super tax the only way in which it can make the profits of the company liable to super tax is by treating them as your profits."

In the *Gramophone Case* (1) Lord Cozens-Hardy M.R. said that there might be circumstances and arrangements which would make a business carried on by a company the business of an individual by virtue of the arrangements and by virtue of his control. Speaking for myself—I am not at all sure that my brothers take the same view as I do—once you get an independent shareholder in the secondary company it is impossible to say that the business of the secondary company is the business of the man who owns most or nearly all of the shares in that company. The profits do not belong to the man who holds most of the shares; they belong to the shareholders through the company, and the moment you get Mr. Hime with one share, quarrelsome and independent, in my view it is impossible to find that the business is the business of the man who owns all the rest of the shares; it is the business of the man who owns all the rest of the shares and Mr. Hime. For these reasons it seems to me useless to send this case back to the Commissioners to make findings on the lines instituted by Rowlatt J. I think they have already answered the questions when they have found a legal entity and genuine loans, because I agree with the Master of the Rolls, that a man cannot have a genuine loan to himself out of his own money. I do not see how such a transaction can be a genuine loan or how it is possible to find a genuine loan if that is the sort of transaction which is supposed to have taken place in this case. Apart

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from that I do not see how it can be possible for the Commissioners to make any finding to the effect that this was the business of Mr. Sansom, once you get that there is an independent shareholder in the company of John Sansom, Ltd., who is not Mr. Sansom and who therefore has an interest in the business and in the profits of the business.

For these reasons, one of which is peculiar to this case, the other of which is of general application to all cases of companies, I think it would be useless to send this case back to the Commissioners. I think they have already found the facts, and could not in law make contrary findings, and for these reasons I agree with the Master of the Rolls that this appeal should be allowed, and the case should not be sent back to the Commissioners.

YOUNGER L.J. The learned judge, as appears by his judgment, was asked by the Commissioners of Inland Revenue at the hearing to decide out of hand on the facts stated in the case either (1.) that Mr. Sansom did in this instance carry on this company's business as his own to the exclusion of the company, or (2.) that if the company did carry on the business it carried it on as the agent of Mr. Sansom, who was to be regarded as a principal standing outside the company. The learned judge refused so to decide either of these points in the sense contended for, although not, as would appear from his judgment, without some hesitation. To my mind the fact that such a request was in face of the findings contained in the case actually made by the Commissioners, coupled with the fact that that request when made was rejected by the learned judge only with some hesitation, clearly indicates that the position of Mr. Sansom towards the company and of the company towards him, all as set forth in the case, were not, with their necessary implications, sufficiently recognized and accepted in the Court below, and as there appears to be an increasing tendency in this direction, it may be not without advantage to deal with this aspect of the case in some detail. As set forth in the case and accompanying documents the position seems to have

been in no way abnormal. Mr. Sansom, in November, 1911, was, as appears from the company's memorandum of association, carrying on business as a timber merchant at various addresses in Birkenhead. In that month he was minded to transfer that business of his to a company promoted by himself for the purpose of acquiring and carrying it on. Accordingly he caused the company now in question to be incorporated as a private company with a nominal capital of 25,000*l.* divided into 2500 shares of 10*l.* each, its principal object, as defined in its memorandum of association, being to take over Mr. Sansom's business with all its assets and liabilities, as a going concern upon the terms of a contract of sale therein referred to. Under the provisions of that contract the consideration payable by the company for the business was 25,000*l.* to be satisfied in fully paid shares of the same nominal amount, all of them to be issued to or by the direction of Mr. Sansom, the vendor. The memorandum of association was signed by Mr. Sansom and his manager, Mr. Hime. One of the 2500 fully paid shares was, presumably by Mr. Sansom's direction, issued to and until 1917 remained registered in the name of Mr. Hime. He was throughout all that period the legal holder of that one share. Whether he was also its beneficial owner does not appear, and to my mind it is really immaterial whether he was so or not. His legal ownership of that single share, evidenced by its being registered in his name, sufficed to constitute the statutory minimum of the company's share holding. There must now in a private company be at least two corporators, but the Companies (Consolidation) Act, 1908, s. 2, does not ensure, nor does it require, more than a nominal plurality of persons. One of the two may be a trustee for the other, inasmuch as a shareholder is constituted by holding legally a single share in the company. As was stated by Lord Halsbury in *Salomon's Case* (1)—he was there dealing with the then minimum number of seven shareholders for all companies whether public or private—"If they are shareholders, they are shareholders for all purposes; and even if the statute

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(1) [1897] A. C. 22, 30.

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was silent as to the recognition of trusts, I should be prepared to hold that if six of them were the cestuis que trust of the seventh, whatever might be their rights inter se, the statute would have made them shareholders to all intents and purposes with their respective rights and liabilities, and, dealing with them in their relation to the company, the only relations which I believe the law would sanction would be that they were corporators of the corporate body." And Lord Herschell in the same case said: (1) "Whether they are beneficial owners or bare trustees is a matter with which neither the company nor creditors have anything to do: it concerns only them and their cestuis que trust if they have any."

Accordingly, so far as I am concerned, I am prepared to deal with this case on either footing—that Mr. Hime was a beneficial owner, or that he was a trustee. I think myself, on the facts of this case, that it makes no difference which he was, and I cannot myself suppose that the position of Mr. Sansom in relation to the company was in any way altered by the transfer in 1917 of that share by Mr. Hime to his own daughter. What is important is that Mr. Sansom, throughout its whole existence, held all the other shares of the company—that is to say, 2499; these were registered in his name and they were his own. By the articles of association Mr. Sansom was appointed the company's governing director. That office was his, and after his death his executors', so long as 500 of those original shares remained registered in his name or theirs. The office carried with it the right to exercise on behalf of the company every power the company possessed not by statute required to be exercised in some special way.

Now the purchase agreement entered into on the incorporation of the company was in due course completed; the shares to be issued in pursuance of it were issued; the business which had formerly belonged to Mr. Sansom was transferred to the company, and by and in the name of the company the business was carried on until September, 1917,

(1) [1897] A. C. 22, 46.

when the company went into voluntary liquidation, its auditor, as we have been told by counsel, was appointed liquidator, and the business has now been entirely wound up.

And all this, either appearing on the case, or stated at the Bar, was done as the law allows. It is no part of my duty to express any opinion at all upon the existing statutory policy in such a matter. There may be room for different views upon it, but at all events it is a considered and deliberate policy: and it is, perhaps, permissible to invite those who would cast stones at the existing statutory provisions in relation to private companies to suggest any substantial amendments which if they checked fraud in one case would not be calculated to stop enterprise in a hundred. That task has often been attempted by, amongst others, at least two influential departmental committees; it has not yet been accomplished.

As Lord Herschell says—again I am quoting from a passage in his judgment in *Salomon's Case* (1)—“It may be that a company constituted like that under consideration was not in the contemplation of the Legislature at the time when the Act authorizing limited liability was passed; that if what is possible under the enactments as they stand had been foreseen a minimum sum would have been fixed as the least denomination of share permissible; and that it would have been made a condition that each of the seven persons”—that was then the minimum number—“should have a substantial interest in the company. But we have to interpret the law, not to make it; and it must be remembered that no one need trust a limited liability company unless he so please, and that before he does so he can ascertain, if he so please, what is the capital of the company and how it is held.” These remarks made in 1897 were striking then. They are still striking to-day. But with this difference, that in the interval—in 1907—the Legislature actually singled out private companies for special privileges; amongst others it has reduced the requisite complement of

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(1) [1897] A. C. 22, 46.

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Now, speaking for myself, I do in the light of these considerations, deprecate in connection with what are called one-man companies the too indiscriminate use of such words as simulacrum, sham, or cloak—the terms found in this case—or indeed any other term of polite invective. Not only do these companies exist under the sanction, even with the encouragement of the Legislature, but I have no reason whatever to doubt that the great majority of them are as bona fide and genuine as in a business sense they are convenient and suitable media for the provision and application of capital to industry.

No doubt there are amongst such companies, as amongst any other kind of association, black sheep; but in my judgment such terms of reproach as I have alluded to should be strictly reserved for those of them and of their directors who are shown to deserve condemnation, and I am quite satisfied that the indiscriminate use of such terms has, not infrequently, led to results which were unfortunate and unjust, and in my judgment this is no case for their use. For, although it may well be that the statutory privileges, of which here Mr. Sansom took full advantage, may in some instances enable a trader to circumvent the creditors of his business with a facility not otherwise open to him, it is, I think, quite clear, on the case as stated, that there was no trace of anything of the kind even suggested in relation to Mr. Sansom's company. Every creditor of that company, and of the business previously carried on by Mr. Sansom, has been paid everything that was due to him. Reasonably profitable as it was before the war, the profits of the business increased largely during the war, and income tax and excess profits duty have been regularly paid and accounted for by the company throughout. Even the so-called loans to Mr. Sansom himself up to 1917, if the calculations put before us by Mr. Latter were correct, involved no loss to the Revenue, whether in respect of super tax payable by Mr. Sansom or otherwise. In short the whole

case indicates to my mind with the utmost clearness that this was a private company, regularly formed to take over a business ; that it paid for it and took it over ; that it carried it on with entire regularity ; and having discharged every debt and liability incurred by it, was finally in due form wound up, and is now at an end. So far as the case stated by the Special Commissioners is concerned there was nothing in the history of this company—with the one possible exception of the so-called loans reserved for separate consideration—which was otherwise than regular from start to finish.

Now throughout its course and up to the very date of its liquidation Mr. Sansom was the governing director of the company. He held, as I have said, possibly every share—certainly every share but one. Every important act of the company I have no doubt was inspired and directed by him. There was nobody else to inspire or direct the actions of the company. Every power the company possessed was his to exercise on its behalf. But there is nothing anywhere to suggest that any act which was inspired and directed by him was not so inspired and directed as governing director of the company, and as its agent for that purpose. Indeed there is no reason I can see why that should not have been the case or why every transaction in connection with the company should have been any other than it purported to be. This company might have been registered with unlimited liability without in the event introducing a single element of added risk. There was no occasion or necessity for any subterfuge at all in relation to the conduct of its business. In those circumstances, all of which can be gathered from the case and the documents to which we are entitled to refer, I can myself see no room for the order which the learned judge has made.

The first question which under that order the Commissioners are directed to answer is “Whether in point of truth and in fact the company did carry on this business or whether the respondent”—that is to say, Mr. Sansom,

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C. A. who is, unfortunately, now dead—"really carried it on to the
1921 exclusion of the company."

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Now in connection with the facts of this case I really do not know what that question means. It is conceded that the entire property in this business was bought and paid for by the company, that it passed to the company nearly ten years ago, that every transaction thereafter was carried out by and in the company's name, and has now been carried to completion in a liquidation regularly constituted. In those circumstances unless the company's legal status is to be denied to it—and this is expressly disclaimed by the learned judge—there appears to me to be no room on this case as stated for directing any such inquiry. The facts already stated appear to me to preclude both its propriety and its utility.

The second and third questions which the learned judge asks—they are different aspects of the same inquiry—are "Whether if the company did carry on the business it carried on the business as agent for the respondent, who is to be regarded as a principal standing outside the company, or whether it carried on the business on its own behalf and for the benefit of the corporators, which practically is the respondent inside the company."

Now with reference to these questions my clear view is that unless in the case of every company constituted as this was it is to be held that the burden is laid upon it, and upon its managing director and principal or even only beneficial shareholder, in every case where the question is raised, affirmatively to prove that the acts ostensibly of the governing director as such are not really his own acts outside the company and his office—unless that is to be taken to be the true position, I can see no room in the case of this company for these questions which the Commissioners are asked to answer, and I need hardly say that to my mind that is not the true position, and for the reasons I have already given. In my judgment so long as such a company as this was is recognized by the Legislature there can be no reason why the contracts and the

engagements made in its name or entered into on its behalf, and themselves *ex facie* regular, should not everywhere until the contrary is alleged and proved be regarded as the company's and not those of somebody else, any more than there is any reason why the contracts and engagements and transactions, say even of such a company as the London and North Western Railway Company, should not be regarded as regular until the contrary is shown. To my mind it is strange that it should be necessary to insist upon this aspect of the case at this time of day. But until it is fully realized the loyal adherence to the principles of *Salomon's Case* (1), to say nothing of obedience to the declared policy of the Legislature—which is required of all Courts—will not be forthcoming.

So far on the general question I have hitherto purposely omitted any specific reference to the matter on which the whole case really turns—that is to say, what was the true character of these loans or so-called loans which were made, or were said to be made by the company to Mr. Sansom?

Now with regard to these loans there is a direct finding of fact by the Commissioners already alluded to by the Master of the Rolls and which I think the Solicitor-General and Mr. Hills both recognized must be accepted. Nor, in terms, has the learned judge, in the questions which he has thought fit to put to the Special Commissioners, rejected it. Nor could he. That finding is binding both upon him and upon us, and, in my opinion, unimpeached, it is conclusive of the whole case for the reasons already given by my Lord. I wish, however, to express, if I may be allowed to do so, my fullest concurrence with what has fallen from Scrutton L.J. and also from the Master of the Rolls on the question in relation to these loans, as it must have presented itself to the Crown before the case came before the Special Commissioners at all. The transactions between Mr. Sansom and the company in relation to these loans are indeed on the face of them very singular. I myself think them more singular if Mr. Sansom is to be regarded as the managing

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director exercising all the powers of the company, than they would be if he is to be regarded as dealing with the company's money as his own. For not only is it a remarkable thing that a company should lend its money without interest and without security, but it is an even more remarkable thing that its governing director who exercises all its powers should call upon it to exercise that power of lending in a form so entirely in his own favour. In other words, the case of the Crown when the question went before the Special Commissioners in the first instance, was, it appears to me, a stronger case, if all the principles and implications of *Salomon's Case* (1) were recognized than if they were not. But all that is now made academic by the finding of the Commissioners. They, having heard Mr. Sansom and having heard all the evidence, have found that the loans were genuine loans, one consideration leading them to that conclusion doubtless being contained in the statement made by them in the case that there was, in the earlier stages of this company, a loan under precisely similar terms and conditions, which, after a few months, was repaid by Mr. Sansom to the company. In fact, although *prima facie* one would not be ready to arrive at that conclusion, the Commissioners may well have thought that here was Mr. Sansom capitalising, if I may use the expression, the business of the company out of its profits, not himself as a shareholder drawing dividends from the company at all, but when moneys were taken out of it by him, taking them as loans, so that the relation of debtor and creditor being constituted between him and the company in respect of them, the company was entitled to repayment as and when that was required either by himself or by any other person, say a liquidator, empowered to act on its behalf. In short the Commissioners having heard it at length found the case to be an honest case all through. Therefore, although the case for the Crown was, as I think, very strong before the Commissioners found those to be the facts, that case did not even then depend upon any denial of those principles in relation to

(1) [1897] A. C. 22.

private companies which, as it seems to me, are thoroughly well established, and in the case of this company now that its bona fides stand affirmed ought to be fully recognized. For these reasons I think that the questions directed by the learned judge were out of place and that this appeal should be allowed.

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Appeal allowed.

Solicitors for appellants : *Peacock & Goddard, for Toulmin & Ward, Liverpool.*

Solicitor for respondents : *Solicitor of Inland Revenue.*

W. I. C.

[IN THE COURT OF APPEAL.]

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March 2.

In re AN ARBITRATION BETWEEN MOORE AND COMPANY,
LIMITED AND LANDAUER AND COMPANY.

Sale of Goods—Canned Fruits—Express Term as to Mode of Packing—Cases to contain Thirty Tins Each—Breach as to Part—Right to reject Whole—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 13; s. 30, sub-s. 3.

By a contract for the sale of a quantity of cases of Australian canned fruits the goods were stated as being in cases containing thirty tins each, payment to be per dozen tins. The sellers tendered the whole quantity ordered, but about one-half of the cases contained twenty-four tins only; the remainder contained thirty tins. The buyers refused on this ground to take delivery, and the dispute was referred to arbitration. The umpire found that there was no difference in the market value of the goods whether packed twenty-four or thirty tins in a case, and that the goods tendered were a good delivery:—

Held, that the sale was a sale of goods by description, and as the goods contracted to be sold were mixed with goods of a different description the buyers were entitled under s. 30, sub-s. 3, of the Sale of Goods Act, 1893, to reject the whole consignment.

Judgment of Rowlatt J. [1921] 1 K. B. 73 affirmed.

APPEAL from the judgment of Rowlatt J. on an award in the form of a special case. (1)

By a contract dated June 14, 1919, Moore & Co., Ltd.

(1) [1921] 1 K. B. 73.

C. A. 1921 MOORE & Co. AND LANDAUER & Co., <i>In re.</i>	(herein called the sellers), sold to Landauer & Co. (herein called the buyers) "about 3100 cases Australian canned fruits consisting of about 2500 dozen 30/2½ nominal tins Vickar pears at 27/6 per doz., 240 dozen 30/2½ nominal tins apricots at 27/6 per doz., 2358 dozen 30/2½ nominal tins plums at 27/6 per doz., 964 dozen 30/2½ nominal tins Bartlett pears at 27/6 per doz., 1745 dozen 30/2½ nominal tins apples at 23/- per doz.," "shipped per ss. <i>Toromeo</i> ."
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Any dispute under the contract was to be settled by arbitration.

In the above contract "30/2½ nominal tins" meant thirty tins in a case, each tin being of the nominal weight of 2½ lbs.

The goods were shipped on board the *Toromeo* at Hobart early in May, 1919, and the *Toromeo* left for Melbourne on May 12 to complete her loading. She was delayed there and also in South Africa owing to strikes, and did not arrive in London until January, 1920. The delay was in no way attributable to any default on the part of the sellers. As to about one-half of the cases, each case contained twenty-four tins only; the remainder of the cases contained thirty tins each. (1) On the goods being tendered the buyers refused to take delivery on certain grounds, the one material to this report being that they were entitled to reject the whole consignment because half of the cases contained only twenty-four tins each instead of thirty. The dispute was referred to arbitration, and the umpire, on the arbitrators disagreeing, made his award in favour of the sellers, subject to the opinion of the Court on the question (so far as material), "whether in law under the contract of June 14, 1919, the buyers are bound to accept any goods packed twenty-four tins in a case, and if not whether the apricots, plums, and Bartlett pears having been tendered so packed the buyers can reject the whole tender, or must accept that part of it which comprises the Vickar pears and the apples packed in cases of thirty tins." He found that there was

(1) The apricots, plums, and Bartlett pears were packed twenty-four tins to a case; the Vickar pears and apples thirty tins to a case.

no difference in the market value of the goods whether they were packed twenty-four tins or thirty tins in a case, and that the goods tendered were in this respect a good delivery.

Rowlatt J. held that the buyers were entitled to reject the whole consignment.

The sellers appealed.

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Sir John Simon K.C. and *Stuart Bevan K.C.* (*H. H. Joy* with them) for the sellers. The statement in the contract that the goods were packed thirty tins in each case is merely a warranty, the breach of which gives a right to damages only (s. 11 of the Sale of Goods Act, 1893), and is not a condition giving a right to reject. It is not a "description" of the goods within s. 13 and s. 30, sub-s. 3, of the Act. The contract was for the sale of tins per dozen, the payment being per dozen tins, and the statement that the tins were packed thirty tins in a case was merely a mode of calculating the number of tins, and was not a matter of importance. The buyers have suffered no loss, as the umpire has found that there was no difference in the market value of the goods whether packed twenty-four or thirty tins in a case. In *Makin v. London Rice Mill Co.* (1) there was evidence that it was of importance in the American markets that rice should be packed in double bags, that rice in single bags would not readily sell, and that double bags were considered as absolutely essential in New York for transit to the west. Upon that evidence the Court were of opinion that "the mode of packing in double bags affected the quality and description of the thing sold, and that the plaintiff was entitled to reject." There is no such evidence as that in the present case. On the contrary, the finding is that the packing made no difference in the market value of the goods.

[SCRUTTON L.J. referred to *Manbre Saccharine Co. v. Corn Products Co.* (2)]

At any rate, the buyers were not entitled to reject the

(1) (1869) 20 L. T. 705.

(2) [1919] 1 K. B. 198, 207.

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1921 in a case. (1)

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Montgomery K.C. and *Costello* for the buyers were not called upon.

BANKES L.J. In this case I so entirely agree with the view of Rowlatt J. on every point, that it is not necessary to go at any length into the matter. The dispute between the parties arose under these circumstances. The buyers in June, 1919, entered into a contract for the purchase of a quantity of canned fruits afloat. The contract described the goods as being about 3100 cases Australian canned fruits consisting of a certain number of dozen of Vickar pears, apricots, plums, Bartlett pears and apples. All the dozens were described as being thirty tins in a case. The first question which arises is in reference to the construction of the contract. In my opinion it is a contract for the sale of goods by description, and it is part of the description of the goods that they are packed thirty tins in the case. The goods were delayed for an inordinate length of time owing, apparently, to labour troubles at the places at which the vessel called. The goods did not arrive in London until January, 1920. The point is stated in the special case in these words: "Whether in law under the contract of June 14 1919, the buyers are bound to accept any goods packed 24 tins in a case, and if not whether the apricots, plums and Bartlett pears having been tendered so packed the buyers can reject the whole tender, or must accept that part of it which comprises the Vickar pears and the apples packed in cases of 30 tins." That question of law, in my opinion, admits of a very simple answer. If it is true to say, as I think it is, that this is a sale of goods by description, and the statement in the contract that the goods are packed thirty tins in a case is part of the description, there is, under s. 13 of the Sale of

(1) The sellers also contended on the facts that the buyers by their conduct when the goods were tendered had waived the stipulation in the contract that thirty tins were packed in each case. The Court decided this point in favour of the buyers, and it is not considered necessary to report it.

Goods Act, 1893, an implied condition that the goods shall correspond with the description. The goods tendered did not as to about one-half correspond with that description. The effect of that is stated in s. 30, sub-s. 3, which provides that "where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole." That was the buyers' position as defined by the Act, and they rejected the whole. The question of law, as stated by the umpire, admits, as it seems to me, of only one answer—namely, that the buyers were entitled to reject the whole.

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Makin v. London Rice Mill Co. (1) was cited to us. The contract was for the sale of rice in double bags. The case is reported only in the *Law Times*, obviously because it was considered to be of no general importance. All that appears from the judgment is that the judges wished to know whether any evidence had been given at the trial as to the importance from the trade point of view of rice being packed in double bags. It may be that it was very important in those days to ascertain that fact, but here it appears to me it is plain upon the face of this contract that the packing of these particular goods was part of the description of the goods. In these circumstances, it is irrelevant to inquire whether it was considered in the trade a matter of importance, or whether it affected the market value of the goods. If on the face of the contract it appears to be part of the description of the goods, then any inquiry such as was made in *Makin's Case* (1) becomes immaterial. [The Lord Justice then dealt with the question of waiver.]

The appeal must be dismissed.

SCRUTTON L.J. In this case a seller sold to a buyer about "3100 cases of Australian canned fruits, consisting of about" and then follow five items, of which the first is 2500 dozen

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 1921 are informed that 30/2½, which by the light of nature we might
 not have been able completely to understand, means
 thirty tins in a case, each tin being of a nominal weight of
 2½ lbs. When the goods arrived, the seller tendered a
 number of cases, packed thirty tins to a case, and other cases,
 more than half the total number, packed twenty-four tins
 to a case. The buyer, who rejected without giving a reason,
 at the arbitration gave as one of his reasons that he was
 entitled to reject the whole consignment and was not bound
 to accept such part as was packed thirty tins in a case. In
 view of the provisions of s. 30 of the Sale of Goods Act, 1893,
 I should have thought that the buyer was clearly right.
 I adopt as my own the language in which McCardie J. dealt
 with a point of this nature in *Manbre Saccharine Co. v. Corn
 Products Co.* (1) There the contract was for the sale of
 starch in 280 lb. bags, price so much per cwt., and the sellers
 tendered 220 lb. bags, and 140 lb. bags. McCardie J. said :
 " In my opinion it is clear that such words were an essential
 part of the contract requirements. They constitute a portion
 of the description of the goods. The size of bags may be
 important to a purchaser in view of sub-contracts or otherwise.
 A man may prefer to receive starch either in small or large
 or medium bags. If the size of the bags was immaterial I
 fail to see why it should have been so clearly specified in the
 contract. A vendor must supply goods in accordance with
 the contract description, and he is not entitled to say that
 another description of goods will suffice for the purposes of the
 purchaser : see s. 13 of the Sale of Goods Act, 1893. . . .
 The tender by the defendants of starch in bags other than
 280 lb. bags was a failure to comply with their contract."

In the present case for some reason the sellers and buyers
 have put into their contract : " About 3100 cases with 30
 tins to the case." They have put that in as a description,
 and that is what the sellers must tender to the buyers. The
 umpire finds that twenty-four tins to the case are as valuable
 commercially as thirty tins to the case. That may be so.

(1) [1919] 1 K. B. 198, 207.

Yet a man who has bought under a contract thirty tins to the case may have sold under the same description, and may be placed in considerable difficulty by having goods tendered to him which do not comply with the description under which he bought, or under which he has resold. On that point, which appears to be the point on which the special case as stated comes before us, I think the umpire was wrong, and that the judgment of Rowlatt J. is right. [The Lord Justice dealt with the question of waiver.]

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ATKIN L.J. I agree. It appears to me to be clear that the stipulation in the contract that there shall be $2\frac{1}{2}$ dozen tins in a case is part of the description of the goods. There is, therefore, an implied condition that the goods when tendered shall correspond with the description. That condition was broken, and there was a right to reject. It appears to me also to be plain that by reason of s. 30, sub-s. 3, of the Sale of Goods Act, 1893, the sellers were not entitled to insist upon the buyers accepting so much of the goods tendered as happened to correspond with the description. I think the buyers were entitled to reject the whole. [The Lord Justice then dealt with the question of waiver.]

Appeal dismissed.

Solicitors for sellers : *Morgan Veitch & Bilney.*

Solicitors for buyers : *F. C. Mathews & Co.*

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March 4, 8.

[IN THE COURT OF APPEAL.]

MERTENS *v.* HOME FREEHOLDS COMPANY.

[1916. M. 1919.]

Building Contract—Frustration—Stoppage of Work by Ministry of Munitions—Licence to proceed—Refusal brought about by Action of Builder—Subsequent Completion of Work by building Owner—Measure of Damages.

By a contract in writing dated May 12, 1916, the defendant agreed to build for the plaintiff a house subject to the conditions set forth in the schedule thereto for the sum of 1900*l.* The conditions provided (inter alia) that the defendant should begin the works immediately after possession of the site was given to him, and should regularly proceed with and complete the same within six months after the date of the plans being passed by the local authority, and that if the defendant should suspend the works or should not proceed with them with due diligence, the plaintiff by his architect should have power to give notice to the defendant requiring him to proceed, and on failure of the defendant to comply with such notice for thirty days the plaintiff should be entitled to enter upon and take possession of the works and site and employ any other person to complete the works. On July 10, 1916, the plans were duly passed. On July 14, 1916, an Order was made by the Minister of Munitions under the powers of the Defence of the Realm (Consolidation) Regulations, 1914, which provided that on and after July 20, 1916, no person should without licence from the Minister of Munitions commence or carry on any building or construction work. On July 21, the defendant applied for a licence to proceed, and continued to work fairly well until August 12, when he ceased to proceed with due diligence with the deliberate intention, as the Court held, of ensuring that the licence should be refused, and that he should thereby be enabled to put an end to the contract. On September 9, the plaintiff's architect gave him thirty days' notice to proceed with the works. On September 30, before the expiration of the notice, the Minister of Munitions refused to grant the licence to proceed. In an action by the plaintiff for damages for breach of contract :—

Held, by the Court of Appeal (reversing the decision of the Divisional Court), that the defendant could not take advantage of the intervention of the Minister of Munitions which was brought about by his own act, and that the proper measure of damages was what it cost the plaintiff to complete the house substantially as it was originally intended and in a reasonable manner at the earliest moment he was allowed to proceed with the work, less any amount that would have been due and payable to the defendant by the plaintiff, had the defendant completed the house to the roofing in at the time agreed by the terms of his contract.

Hirt v. Hahn (1876) 61 Missouri, 496, cited in Hudson on Building Contracts, 4th ed., vol. i., p. 491, followed.

APPEAL from a decision of the Divisional Court.

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In February, 1916, the plaintiff purchased from the defendant company a plot of ground at Eastcote, Middlesex, with a view to erecting thereon a dwelling house for his own residence.

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By articles of agreement dated May 12, 1916, between the plaintiff (thereinafter called "the employer") of the one part and Charles Lawrence (thereinafter called "the contractor") of the other part, the contractor agreed to build for the plaintiff a house upon the said piece of ground in accordance with the plans and specifications therein referred to and subject to the conditions set forth in the schedule thereto for the sum of 1900*l*. The material conditions were the following :—

"23. Possession of the site (or premises) shall be given to the contractor on or before the 16th day of May, 1916. He shall begin the works immediately after such possession, shall regularly proceed with them, and shall complete the same (except painting and papering or other decorative work which in the opinion of the architect it may be desirable to delay) six months from the date of plans being passed by the Council subject nevertheless to the provisions for extension of time hereinafter contained."

"26. If the contractor, except on account of any legal restraint upon the employer preventing the continuance of the works, or on account of any of the causes mentioned in clause 25, or in case of a certificate being withheld or not paid when due, shall suspend the works, or, in the opinion of the architect, shall neglect or fail to proceed with due diligence in the performance of his part of the contract . . . the employer by the architect shall have power to give notice in writing to the contractor requiring that the works shall be proceeded with in a reasonable manner and with reasonable despatch. . . . If the contractor shall fail for thirty days after such notice has been given to proceed with the works as therein prescribed the employer may enter upon and take possession of the works and site, and of all plant and materials thereon (or on any ground contiguous thereto) intended to be used for

C. A. the works. . . . If the employer shall exercise the above power
1921 he may engage any other person to complete the works. . . .”

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On July 10, 1916, the plans were duly passed, and it there-
upon became the duty of Lawrence to proceed with regularity
and due diligence to complete the works by January 10, 1917.

On July 14, 1916, an Order was made by the Minister of
Munitions in pursuance of the powers conferred upon him
by Regulation 8E of the Defence of the Realm (Consolidation)
Regulations, 1914, which provided that: “On and after the
twentieth day of July, 1916, no person shall without licence
from the Minister of Munitions commence or carry on any
building or construction work,” with certain exceptions.
The Order contained a proviso “that where a first application
for a licence under this Order has been made and is pending
for the carrying out of the work which has been commenced
before the said twentieth day of July, 1916, nothing in this
Order shall prohibit the carrying on of such work until the
licence has been refused.”

On July 21, 1916, Lawrence applied for a licence to proceed,
but continued to work fairly well until August 12, when,
having received considerable sums on account from the
plaintiff, he ceased to proceed with the works with due
diligence.

On September 9 the plaintiff's architect gave him the
thirty days' notice under condition 26 of the contract to
proceed. Before the expiration of that notice, the Minister
of Munitions by a letter dated September 30, 1916, refused
to grant a licence to proceed.

The building had at that time reached the damp course level.

On November 6, 1916, the plaintiff commenced the present
action for breach of the contract of May 12, 1916.

By his statement of claim he alleged that the defendant
R. Masson Smith was at all material times the owner of and/or
partner in the defendant company and/or a co-adventurer
with the defendant Lawrence, or in the alternative that he
held out the defendant Lawrence to the plaintiff as his agent,
whereby the plaintiff was induced to enter into the contract
of May 12, 1916. He further alleged that the defendants

had failed and neglected to finish the house, and had in fact done work on the house to the value of 496*l.* and no more, and that by reason thereof the plaintiff had suffered loss and damage, and in order to finish the house would be compelled to expend thereon a sum of approximately 3000*l.*

By their defence the defendants traversed the plaintiff's allegation as to partnership or agency, and in the alternative alleged that the defendant was discharged from further performance by the Order of the Minister of Munitions of July 14, 1916, and the letter of September 30, 1916, refusing to grant a licence to proceed.

On February 21 and 22, 1918, the action was tried before Avory J. with a jury. The jury found that in entering into the contract the defendant Lawrence was acting as agent for the defendant Masson Smith and returned a verdict for the plaintiff. Avory J. accordingly entered judgment for the plaintiff and remitted the rest of the action to one of the official referees to determine the amount of the damages.

On June 25, 1918, the Court of Appeal granted an order for a new trial.

On February 24, 1919, the action was again tried before Sankey J. sitting with a jury, and resulted in a verdict for the plaintiff on the issue of partnership, and the issue as to damages was referred by Sankey J. to Mr. Pollock, one of the official referees.

On May 4, 1920, the Official Referee made his report, in which on the question whether the contract was put an end to by the Order of the Minister of Munitions he found as follows: "With regard to the second point I find that the contract made by the defendant Lawrence with the plaintiff was one which he could not fulfil except at great loss, and that, apart from the order of the Minister of Munitions, Lawrence was desirous of putting an end to the contract. I find if proper dispatch had been used in the building of the house for the plaintiff the roof might have been on by the end of September, but that the work was intentionally delayed by Lawrence in the hope that the work would be stopped by a refusal of a licence under the Order of the Minister of

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C. A. Munitions dated July 14, 1916. I find that the failure to
1921 carry out the agreement was not caused by the refusal of the
MERTENS licence to proceed, but by the neglect and failure of Lawrence
v. to proceed with due diligence in the performance of his con-
HOME tract. I find that it would have cost the plaintiff 4153*l.*
FREEHOLDS to complete the house in accordance with the contract, and
Co. deducting from that sum the contract price of 1900*l.*, together
with 495*l.*, being the value of the work already done, and
deducting 825*l.* paid to Lawrence, I estimate the damages due
to plaintiff at the sum of 2583*l.*, and I award the costs of the
trial of the issue as to damages to the plaintiff."

The defendants appealed from the Official Referee's report to the Divisional Court (Rowlatt and McCardie JJ.) on the question as to the amount of the damages the plaintiff was entitled to recover.

The Divisional Court held that the damages to which the plaintiff was entitled must be measured as in September, 1916, and that what he was entitled to was the difference between a fair price in September, 1916, for the building erected to the putting up of the roof and half the joinery which ought to have been done and the amount which he ought to have paid for the same work on the terms of the contract. The case was accordingly referred back to the Official Receiver to assess the damages upon the basis indicated.

The plaintiff appealed. The appeal was heard on March 4 and 8, 1921.

Colam K.C. and *Neilson K.C.* for the appellant. Lawrence, knowing that he had made a bad bargain, in order to get rid of it, and being aware of the Defence of the Realm Regulations, deliberately delayed the work on the house, with the result that it was only half finished when building was stopped instead of being roofed in, and consequently the plaintiff was put to a much greater expense in completing the house when building was again permitted.

It is submitted that when a person undertakes a building contract and deliberately breaks it, knowing that a loss will thereby be caused to the building owner, he will be held

responsible for that loss. In effect Lawrence himself wrongfully repudiated the contract and now seeks, by relying on the subsequent refusal of a building licence, to escape the consequences which he himself brought about. It is submitted that the proper measure of damages is the difference between what it would cost the plaintiff to complete the house substantially up to the roofing in, and what was due to Lawrence in respect of the work which he had done upon the building.

[They referred to *Equitable Steam Fishing Co. v. Cochrane* (1) and Hudson on Building Contracts, 4th ed., vol. i., p. 491, citing *Hirt v. Hahn*. (2)]

J. B. Matthews K.C. and *J. H. Watts* for the respondents. The only damages that can be claimed by the appellant in respect of Lawrence's breach of contract are such as may fairly be considered as arising naturally—i.e., according to the usual course of things—from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time when they entered into the contract, as the probable result of a breach of it: *Hadley v. Baxendale* (3); *Agius v. Great Western Colliery Co.* (4) Actual intention and motive of the defendant are immaterial in actions for breach of contract: *Addis v. Gramophone Co.* (5)

The knowledge of any fact which will cause a loss must be knowledge at the date of the contract and not after it in order to be effective. No one at the date of the contract could have anticipated that the Order of the Ministry of Munitions would be made. Lawrence cannot be taken as guaranteeing the appellant against such an Order. The damages are entirely attributable to that Order. It was only about a fortnight or three weeks before the date of the Order that it was at all contemplated that the Order would be made. It is submitted that if the appellant is entitled to any damages at all, they ought to be fixed as in 1916, the date of the breach

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(1) Lloyd's List, May 20, 1919.

(3) (1854) 9 Ex. 341.

(2) 61 Missouri, 496.

(4) [1899] 1 Q. B. 413, 419.

(5) [1909] A. C. 488, 495.

C. A. of the contract, and not as in 1919, the date when the appellant
1921 was allowed to proceed with the work: *Di Fernando v.*

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[They also referred to *Metropolitan Water Board v. Dick, Kerr & Co. (2)*; *Horne v. Midland Ry. Co. (3)*; *Hydraulic Engineering Co. v. McHaffie. (4)*]

Colam K.C. was not called upon to reply.

LORD STERNDALÉ M.R. This is an appeal from the Divisional Court which reversed a decision of the Official Referee, Mr. Pollock. The only question is as to the amount of damages which the plaintiff is entitled to recover.

■ The matter arises out of a building contract by which the defendant Lawrence agreed with the plaintiff to build a house for him for 1900*l.* and to finish it in six months. The contract was made in May, 1916, in the middle of the war. Lawrence has been described by the defendants' counsel as a rogue. I do not know if that is a correct description or not, but there is no great objection to my applying it, as it was the defendants' counsel who suggested the word. The defendant Masson Smith is a gentleman who has been found to be a partner with Lawrence in the transaction, and therefore responsible for his delinquencies. Lawrence made the contract according to the findings of the Official Referee at a price which was very much too low, and undertook to finish the house within a period such that completion within it was at any rate extremely doubtful considering the circumstances in which the contract was made. In fact, he did what one has constantly seen done; he gave any terms he could in order to obtain the contract with the full intention of breaking it, and that he did. The work went on more or less satisfactorily until August, 1916, but before that date certain regulations under the Defence of the Realm Act were issued by the Ministry of Munitions, which provided that on and after July 20, 1916, no person should carry on any building or constructional work, with certain exceptions, without the licence of the

(1) [1920] 3 K. B. 409, 414.

(2) [1918] A. C. 119.

(3) (1873) L. R. 8 C. P. 131, 140.

(4) (1878) 4 Q. B. D. 670, 674.

Minister of Munitions, but these regulations contained a proviso "that where a first application for a licence under any order has been made and is pending for the carrying on of work which has already been commenced at the date when such licence first became necessary, nothing in the order shall prohibit the carrying on of the work until the licence has been refused." Now I agree with the construction put upon that proviso by the Divisional Court; I think it means that if the work was begun before July 20 and then an application for a licence was made the applicant might go on with the work, although he did not make the application until after that date. Lawrence did make an application, but never had any intention from the time he heard of these regulations of carrying on the work properly. He said, and I do not think there is much doubt he meant it, that these regulations were a godsend to him to help him get out of his contract, and he proceeded to do so. He did not go on with his work and did not get the house roofed in, and the result was that the licence was refused. About the end of August Lawrence said that the contract was bad, that he was not any longer going on with it, and that he was very glad there was this Order to help him out of it. He did not go on with the contract, with the result that the plaintiff's architect served upon him a notice under clause 26 of the contract which empowered the plaintiff after thirty days' default after the receipt of the notice by Lawrence to take the house out of his hands and complete it himself. Before the thirty days had expired the licence had been refused on account of the neglect of Lawrence to proceed with the work with proper dispatch, he, knowing that the licence would be refused if he failed to get the house somewhere up to the roofing in, intentionally delaying in order to induce the refusal. I think that is the finding of the Official Referee, and there is evidence to support it. Then the licence was, as a matter of fact, refused about three days before the expiration of the thirty days. The plaintiff, the building owner, did get tenders both for the completion of the work up to the roofing in and also for the completion of the whole of the work. They were for certain

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sums which I need not trouble to consider; but they were for very much less than the cost of the work when it was in fact done some considerable time afterwards. In the meantime the work could not be continued, because the Ministry of Munitions would not allow it, and permission to go on was not obtained until the beginning of 1919, by which time the price of all building materials, work, wages and labour had increased enormously. The Official Referee has given to the plaintiff the amount that it cost him when he was allowed to do the work in 1919. The defendants say that either he is entitled to nothing, or that if he is entitled to anything the measure of damages ought to be fixed in the year 1916. The Divisional Court have adopted the defendants' contention. I cannot agree with them. The first particular in which I differ from them is that I do not think they ever looked at the contract in the right way. They have considered the contract as if it were one to deliver goods in September, 1916—a contract to deliver a roofed house on the ground in September, 1916—and what they have said is, that all that the plaintiff is entitled to is the difference between the price of the work, in fact, done by the defendants through Lawrence, and the price of a roofed house in September, 1916. That is to say, they have treated the contract as if it were one for the sale of goods and have held that the measure of damages is the difference between the market price of the day of what the plaintiff ought to have had and what he got. In my humble opinion that is an entirely wrong way of looking at the contract. There is no contract to deliver goods, and there is no market price for a roofed house. In the Divisional Court Rowlatt J. said: "I think the damage that Mr. Colam's client is entitled to is only the difference between a fair price for this building erected to the putting up of the roof and half the joinery which ought to have been done also at the price of the day, and the amount which he ought to have paid for the same work on the terms of the contract." And McCardie J. said: "The business of the tribunal which has to assess the damages is to find out what is the amount—the value, the price of the

contract work which should have been carried out by September 30, because up to that time there was no restraint. Having got the price of that work under the contract, then it must be remembered that the contract price was, as I understand on the evidence, much below the actual true value of the labour and material. Therefore the next step is that, having ascertained the amount for which the work could be done, you have to find out the difference between the contract price of the work which had been done up to that date as distinguished from "the actual prevailing value of the work and material apart from the contract altogether, because it would have been the latter amount that the owner would have had upon his property if the builder had carried out his part of the bargain." I do not think that is the right measure. I think the right measure is correctly stated in Hudson on Building Contracts, 4th ed., vol. i., p. 491, on the authority of an American case: *Hirt v. Hahn*. (1) "B. agreed to erect a house for the plaintiff according to plans by a certain day. The defendants were B.'s sureties. After partly completing, B. ceased work, and the plaintiff, after giving notice to the sureties, entered and completed and sued the sureties. Held, that the measure of damages was what it cost the plaintiff to complete the house substantially as it was originally intended, and in a reasonable manner, less any amount that would have been due and payable to B. by the plaintiff had B. completed the house at the time agreed by the terms of his contract." It is true that that is an American case. Though I cannot put my finger on them for the moment I feel satisfied that there are English cases which fix the same measure of damages. At any rate for the purpose of this case it is sufficient to say we all consider that the proper measure of damages for the breach of a building contract such as this.

But the building owner must set to work to build his house at a reasonable time and in a reasonable manner, and is not entitled to delay for several years and then, if prices have gone up, charge the defaulting builder with

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(1) 61 Missouri, 496.

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the increased price. I quite agree with what Mr. Matthews says, that a man is not entitled to gamble on the chance of getting the work done cheaper, and then when it proves to be dearer turn round and charge the defaulter with the enhanced price. That is not what the plaintiff did here. He did his best to begin at once to complete the building of the house. He was not able to complete it, because he was not allowed to do so under the Defence of the Realm Regulations. That being so, the question is whether the defaulting builder is entitled to say that the building owner cannot charge him with an increase of price caused by a delay resulting from the interference of a third person, a superior authority, which has prevented the building owner from doing the work. I offer no opinion what the result would be if those were all the facts. The Divisional Court have decided the matter in this way. They have held that both the building owner and the builder would have been entitled to say that this contract was frustrated by the action of the Government in preventing the work going on for so long, and they have said—I think it was McCardie J. who actually mentioned the authority—that it is in accordance with *Metropolitan Water Board v. Dick, Kerr & Co.* (1) Of course, the doctrine of frustration during this war has gone a very long way—there have been very great developments of it from the original cases which stated the principle. How far it has gone I do not feel in a position to say. I do not know if anybody is; I certainly am not. But, so far as I know, it has never been held that a man is entitled to take advantage of circumstances as a frustration of the contract if he has brought those circumstances about himself. That seems to have been the ground upon which Rowlatt J. based his decision in *Equitable Steam Fishing Co. v. Cochrane*. (2) For instance, to go back to the leading case of *Taylor v. Caldwell* (3), where the frustration was the destruction of a music hall the letting of which was the subject matter of the contract, I do not think any authority has gone so far as to

(1) [1918] A. C. 119.

(2) Lloyd's List, May 20, 1919.

(3) (1863) 3 B. & S. 826.

decide that if the defendant had burned down the music hall himself, he would have been entitled to say the subject matter was gone and the contract was frustrated, and I am certainly not prepared to go that length myself.

In this case what the Official Referee has found is this. [His Lordship read the finding of the Official Referee and continued:] Therefore he finds that Lawrence, knowing that he had a bad bargain, and having made up his mind to get out of it, knowing also of the Defence of the Realm Regulations, deliberately delayed the work in order to get the licence refused, and got it refused. That being so, it seems to me that Lawrence cannot be allowed to take advantage of the intervention of the Minister of Munitions, which is what he played for and what he got. To turn Mr. Matthews' argument the other way, just as the plaintiff cannot gamble on what may happen in the future as to price, so Lawrence cannot gamble on what is going to be the effect of the refusal to grant a licence which he himself had played for and gambled on, and procured to be refused, and which was not granted till a long time afterwards. That was his fault. I think the Official Referee under these circumstances was right in saying the amount the defendant Masson Smith has to pay (he has to pay for Lawrence's delinquencies) was the amount which the plaintiff, exercising all diligence as the plaintiff, undoubtedly did have to pay to get the house completed, and the effect of the Minister of Munitions' intervention cannot be prayed in aid by Lawrence when he brought that intervention about himself.

I think the appeal should be allowed and the amount awarded by the Official Referee should stand as the amount the defendant has to pay. There might be a question as to the cost of the whole completion of the house, but that is not before us, because all the plaintiff is asking for is the cost of the completion of the house up to the roofing in, which Lawrence could have done perfectly well if he had used due diligence.

I ought to make one other observation. It was said that this contract was frustrated, because in any circumstances

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Lawrence would not have been allowed to complete the house, and that to bind him to complete it up to the roof is to put upon him a different contract from completing it altogether. He might have got a more profitable contract out of what was taken away than out of what was left by way of extras and things of that sort. There again it seems to me that it is quite impossible for him to pray that in aid when he has brought about the refusal of the licence by his own act.

I think the appeal should be allowed and the plaintiff have judgment for the amount found by the Official Referee with costs both here and below.

WARRINGTON L.J. I am of the same opinion.

The Referee has adopted what I think is the true measure of damages—namely, “what it cost the plaintiff to complete the house substantially as it was originally intended, and in a reasonable manner, less any amount that would have been due and payable” to the builder by the building owner, that is to say to the defendant by the plaintiff, had the defendant “completed the house at the time agreed by the terms of his contract.” I am reading that from an example given in Hudson on Building Contracts, at p. 491, from a case in Missouri. It seems to me to express correctly the true measure of damages, and that statement is exactly applicable to the present case—substituting only for “complete the house,” “complete the house to the roofing in”—the period adopted by the Official Referee.

Now the Official Referee has allowed to the plaintiff the cost of doing that work as in the year 1919, when he was first able in fact to do it—of course, with the necessary additions and allowances to which either side unquestionably was entitled by virtue of the contract, but the principle upon which the Official Referee has proceeded is to give the plaintiff the cost of doing the work at the earliest moment at which in fact he was able to do it. The Divisional Court has substituted for the measure of damages adopted by the Referee what, with all respect, appears to me to be an incorrect

measure of damages—namely, they have treated the contract as if it were one for the sale of goods and have held that the plaintiff is entitled to the difference between the value of the thing he got at the material time—that is to say, when the breach was committed—and the value of the thing which he would have got if the defendant had done his duty. In my opinion that is not the true measure of damages in a contract of this kind.

Now the general principle being, as I have said, that which is correctly stated in the case to which I have referred, it seems to me that for the purpose of the present case at all events it is unnecessary to go any further than to say that it was accepted by Mr. Matthews in this Court in the course of his argument for the defendant.

But, of course, the plaintiff being entitled to what it would have cost him, or what it did cost him to do the work, the defendant is entitled to say that the plaintiff must proceed with all reasonable diligence and must do the work in a diligent manner and in a reasonable manner; that he must not wait in the hope that the cost of building materials will go down and then when he finds that they have not gone down but have gone up, claim against the defendant the cost of doing the work at that higher price.

That, of course, is right. But then the plaintiff's answer is, and I think, in the present case, at all events, it is a sufficient one—namely, that the delay was occasioned not by any fault of his, that he made every effort that was in his power to obtain permission from the competent authority to go on with the work, but was not able to obtain it; but that as soon as that prohibition was withdrawn, which was in the year 1919, he did the work. In reply the defendant's counsel contends that if the Court adopts that view it will be introducing an entirely new principle, and will be holding that the defendant may be responsible for delay occasioned by the act of a third body—in this case the Ministry of Munitions. Whether in an ordinary case that might be a valid answer to the plaintiff's contention I express no opinion; it might or might not be, but I am perfectly

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clear that, in the present case, the defendant cannot take advantage of the position occasioned by the interference of the Minister of Munitions, because it was that very thing the defendant Lawrence had brought about by his own act. He, having made an unprofitable contract, is found by the Official Referee deliberately to have abstained from doing that which would have obtained him a licence to proceed, at all events to the roofing in of the house, in order that he might be relieved from the embarrassment of this very unprofitable contract; and then he seeks to say to the plaintiff, that being so, although you have not been able to do this work except at the higher price at which materials were in 1919, you are to get no more than what it would have cost you if you had done it in 1916. In my judgment, in the present case no such contention can be listened to for a moment. I think it quite clear that if the defendant had proceeded with sufficient diligence even to have got up to the first floor the authorities would have allowed him to go on to the extent of roofing the house, but he deliberately abstained from even doing that much in order that he might obtain the advantage of what he appears to have said was a godsend to himself.

For these reasons it seems to me that the decision of the Official Referee was right and that of the Divisional Court was wrong; and the order proposed by the Master of the Rolls is the right order to make.

YOUNGER L.J. I am of the same opinion.

The only matter we have to determine is the proper measure of damages to be paid by the defendant to the plaintiff by reason of the failure on the part of the defendant to use due and proper diligence in completing up to the roof a house which he had contracted with the plaintiff to build by an agreement dated May 12, 1916. That he failed to use such diligence through his agent, for whom he is responsible, was not disputed by Mr. Matthews before the Divisional Court, and has not been disputed by him here; and, accordingly, the only question that we have to determine is, what is the

compensation to which the plaintiff is entitled by reason of that failure on the part of the defendant?

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Now the contract was to build a house for the plaintiff, and in respect of its non-erection up to a particular stage—the defendant is not responsible for the fact that the whole house has not been built—the defendant has failed to fulfil his contract. The plaintiff, accordingly, is entitled to have partially built that house which the defendant was bound so to build for him and has not built, and the damages which the plaintiff has sustained by reason of the defendant's breach is naturally and properly, as it seems to me, as it does also to the other members of the Court, the cost to which the plaintiff was put in reasonably carrying out, by himself and for himself, that work which the defendant had failed to do, less only the sum which the plaintiff was bound to pay the defendant under the contract for carrying out the same work.

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Now it is not, I think, disputed by Mr. Matthews that that in principle is normally the correct way of assessing damages in such a case. But he says that there emerged in this case a special difficulty not capable of being foreseen by either of the parties to this contract at the date when it was entered into, which has, in point of fact, greatly increased the cost to the plaintiff of completing the house up to the roof, and Mr. Matthews says that for that increased cost the defendant ought not to be made responsible by reason of the fact that the difficulty which has occasioned it was not, and could not have been foreseen by either party to the contract at its date.

Now, the difficulty of course was, as has been explained by my Lord and the Lord Justice, that on, I think, September 27, 1916, there was, in fulfilment of a previous warning given by the Ministry of Munitions in the month of July, an embargo placed upon the further prosecution of this contract work. It has, as I have already said, been found that, by due diligence on the part of the defendant, the work up to the roof could have been completed before the embargo became effective; and it has also been found by the Official

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1921 abstained from completing the work in the way in which he
MERTENS might have done, in order that the work being left in a more
v. or less embryonic state, the embargo in relation to it would
HOME certainly be enforced by the Ministry of Munitions, and
FREEHOLDS the defendant be thereby relieved from a contract which,
Co. always burthensome, had, by that time, become highly
Younger L.J. unprofitable.

Now it appears to me that, so soon as all that is established this conclusion follows, that the defendant not only did his best, by his abstention from doing work that he was bound to do, to bring about this embargo on which he now seeks to rely as an escape from his bargain, but that he, when he so abstained from work which he was bound to do under his contract, had full notice or must be taken to have had full notice of the natural and probable consequence to the plaintiff of this abstention in relation to any extra expense or difficulty that the plaintiff would be put to in completing the house for himself in so far as that was occasioned by the very embargo which the defendant did his best to make effective. It appears to me, therefore, that such expense would be within, and is within, the proper measure of damage that the defendant should be called upon to make good.

Now, it is not disputed by Mr. Matthews that if, in point of fact, notwithstanding the embargo, the plaintiff had proceeded on September 30 to complete this house up to the roof he would have been entitled to charge the defendant with the cost of doing so, however much that might have been increased by circumstances arising out of the war. If that be so, one asks oneself why, when two years later it was possible for the plaintiff to do that which, by reason of the embargo, it had been previously impossible for him even to commence—namely, to proceed to the completion of this house up to the roof—the cost was greater than it would have been had there been no war—one asks oneself why if what the plaintiff did was reasonable and proper to do in providing himself with that house up to the roof which the defendant had failed to provide for him under his contract, the additional

cost should not also be borne by the defendant, and I confess I am unable to see any reason why it should not be so borne. It is not as if in this instance there had been included in the damages, which the defendant has been made to pay to the plaintiff any sum in respect of loss, or inconvenience sustained by the plaintiff in respect of the fact that he was for two years, or, it may be, for three years, kept out of a house, to which, as Mr. Matthews has told us, he desired to bring his bride three years before. The defendant has not been made to pay anything on that score, although attributable, as I agree it would have been, directly to the embargo. I do not know that he might not have been made responsible for it. But all that the defendant has been called upon to pay has been the necessary and proper cost to which the plaintiff was put by completing at the earliest moment at which he could incur the expense the work which the defendant in breach of his contract had failed to carry out. It is to my mind a mere accident that the cost two years after was heavier than was the cost at the time the breach was completed, and it is a mere accident that the embargo which existed for that time had any operation in bringing about the change in price. Mr. Matthews, indeed, said that if in point of fact, at the close of the embargo, the cost of building the house when the plaintiff built it would have been less to him than it would have been had he proceeded at once to do so, the plaintiff would still have been entitled to recover from the defendant the larger sum. I do not think so. In my judgment the plaintiff was here only entitled to recover from the defendant the reasonable cost to which he has in fact been put in providing himself with the unfinished house which the defendant was by his contract bound and which he failed to provide.

It appears to me, therefore, that in the circumstances of this case which have been fully detailed by my Lord and the Lord Justice, and notwithstanding this delay of two years, the defendant is liable for the sum which has been found by the Official Referee to be due from him, that sum being the cost to the plaintiff of completing this house up to the roof in

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C. A. a reasonable manner and at the earliest moment at which it
1921 was possible for him to do so.

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I think, therefore, that this appeal must be allowed and the order of the Official Referee restored.

Appeal allowed.

Solicitors for appellant : *Woodham Smith & Borradaile.*

Solicitors for respondent : *Campbell, Hooper & Todd.*

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[IN THE COURT OF APPEAL.]

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YUANMI GOLD MINES, LIMITED v. EBORALL
(SURVEYOR OF TAXES).

Revenue—Income Tax—Computation of Profits—Diminution due to Circumstances attributable to War—Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 133—Revenue Act, 1865 (28 & 29 Vict. c. 30), s. 6—Finance Act, 1914 (Session 2) (5 Geo. 5, c. 7), s. 13.

A company made profits for their financial year 1913 of 76,000*l.*, for the year 1914 of 36,000*l.*, and for the year 1915 of 16,000*l.* For the year 1916 they made a loss of 11,000*l.* The diminution in their profits for the year 1916, due to circumstances attributable directly or indirectly to the war, was taken to be the sum of 6000*l.* The company were assessed by the Commissioners to income tax in respect of the year 1916 upon the average profits of the three years preceding the year of assessment—namely, 1913, 1914, 1915—in the sum of 42,000*l.* less the sum of 6000*l.*—being the amount of diminution of the profits and gains in the year of assessment attributable to the war. Upon appeal from that assessment Rowlatt J. held that the combined result of s. 13, sub-s. 1, of the Finance Act, 1914 (Session 2), s. 133 of the Income Tax Act, 1842, and s. 6 of the Revenue Act, 1865, was that the company were liable to be assessed for the year 1916 upon the average of the profits for the year of assessment and the two preceding years, the profits for the year of assessment being taken to be the average of the profits for the three years preceding the year of assessment less the amount by which the profits of the company, during the year of assessment, had been diminished by circumstances attributable to the war. Upon that footing he held that the company were taxable on 29,000*l.*, and therefore entitled to a relief of 13,000*l.* upon the original assessment :—

Held, by the Court of Appeal, that Rowlatt J. had not given effect

to s. 6 of the Revenue Act, 1865, which provided that no reduction should be made unless the profits of the year of assessment were proved to be less than the profits for one year on the average of the last three years, including the year of assessment. Lord Sterndale M.R. and Scrutton L.J. held that in ascertaining the result of the company's trading in 1916 the profits should be determined by an examination of the books and the preparation of an account, excluding from the debit side all non-war losses, and not by reference to any average profits or the profits of a preceding year. Having thus ascertained the profits of the year of assessment, an average must be taken of those profits and the profits of the two preceding years, and that average would show the amount by which the original assessment should be altered. In the present case no examination of the books having been made, the materials for that method of computation were not before the Court, but adopting the only possible method of estimating the non-war losses the result was as follows: As between the years 1915 and 1916 there was a diminution of 27,000*l.* Of this, 6000*l.* represented war losses, and 21,000*l.* non-war losses. Excluding the latter there was a profit of 10,000*l.* The profits of the last three years respectively, including the year of assessment, stood, therefore, at 36,000*l.*, 16,000*l.*, and 10,000*l.*, producing an average of 21,000*l.*, to which amount the original assessment of 42,000*l.* must be reduced.

Younger L.J. by a different process of reasoning found that the company were entitled to no relief at all.

Decision of Rowlatt J. [1920] 1 K. B. 529 reversed.

Held, further, that s. 133 of the Act of 1842, as amended by s. 6 of the Act of 1865, did not confer upon the Commissioners an absolute discretion to amend an assessment to any figure they thought fit provided the assessment was not reduced lower than the basis fixed in the Act of 1865. They had power only to amend the assessment having regard to the actual profits and gains for the year of assessment.

Decision of Rowlatt J. on this point affirmed.

APPEAL from the decision of Rowlatt J. upon a case stated under s. 59 of the Taxes Management Act, 1880, by the Commissioners for the General Purposes of the Income Tax Acts for the City of London.

The case is set out in the report of the hearing in the Court below. (1) Shortly stated, the facts were as follows: At a meeting of the Commissioners held in March, 1918, the Yuanmi Gold Mines, Ltd. (hereinafter called the company), appealed against an assessment raised upon them under s. 2, Sch. D, of 16 & 17 Vict. c. 34, in the sum of 42,960*l.* for the year ending April 5, 1917.

(1) [1920] 1 K. B. 529.

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The assessment was based upon the average profits of the three years previous to the year of assessment. For the year ending June 30, 1913, the company had made profits amounting to 76,385*l.*, for the year 1914, 36,450*l.*, and for the year 1915, 16,045*l.*, the average profits being 42,960*l.* For the year ending June 30, 1916, the accounts of the company showed a loss of 11,135*l.* The company claimed relief from the assessment under s. 13, sub-s. 1, of the Finance Act, 1914 (Session 2), s. 133 of the Income Tax Act, 1842, and s. 6 of the Revenue Act, 1865 (1), on the ground that the profits of the company for the year of assessment had been diminished by reason of circumstances attributable directly or indirectly to the war, and sought to have the assessment amended by substituting the above-mentioned loss of 11,135*l.* in 1916 for the above-mentioned profit of 76,385*l.* made during the year 1913, thereby reducing the assessment as follows: Profits for 1914, 36,450*l.*, for 1915, 16,045*l.*, for 1916, minus 11,135*l.*, making an average profit of 13,787*l.* It was proved before the Commissioners that during the year ending June 30, 1916, the profits of the company had to some extent been diminished by circumstances attributable to the war, and to a greater extent by circumstances not so attributable. It was agreed between the parties that for the purposes of the case the diminution of profits for the year ending June 30, 1916, attributable directly or indirectly to the war should be taken to be the sum of 6000*l.*

The Commissioners reduced the assessment by the sum of 6000*l.*, being the agreed amount of diminution of profits or gains attributable to the war. On the company's appeal from that decision, Rowlatt J. held that the company were liable to be assessed for the year ending June 30, 1916, upon the average of the profits for the year of assessment and the two preceding years, the profits of the year of assessment being taken to be the average of the profits for the three years preceding the year of assessment, less the amount by which the profits of the company, during the year of assessment, had

(1) The material sections of these Acts are set out in the report of the hearing in the Court below at pp. 529, 530.

been diminished by circumstances attributable, directly or indirectly, to the present war.

The Surveyor of Taxes appealed.

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1921. Feb. 8. *Sir Ernest Pollock S.-G.* and *R. P. Hills* for the appellant. The effect of the Finance Act, 1914 (Session 2), s. 13, sub-s. 1, the Income Tax Act, 1842, s. 133, and the Revenue Act, 1865, s. 6 (1), is that where the taxpayer can prove a diminution of profits directly or indirectly attributable to the war he is entitled to claim the relief provided by s. 133 of the Act of 1842, and s. 6 of the Act of 1865. Under s. 133 of the Act of 1842, where it is proved at the end of a year of assessment that the profits and gains during that year fall short of the sum computed upon the average, the Commissioners have a discretion to amend the assessment as the case shall require.

All that is submitted is that a certain latitude is given to the Commissioners by s. 133. Sect. 134 deals with the case where a man ceases to carry on the business. That section is specially excluded from war relief. Sects. 133 and 134 to a certain extent overlap.

Sect. 6 of the Act of 1865 seriously modified the relief given to the taxpayer by s. 133.

In 1907 the two sections were repealed, but for a limited purpose they were again brought into operation by s. 13, sub-s. 1, of the Finance Act, 1914 (Session 2).

Rowlatt J. has overlooked the condition precedent laid down in s. 6 of the Revenue Act, 1865—namely, that no reduction shall be made unless the actual profits of the year of assessment are proved to be less than the average profits for one year on the average of the last three years including the year of assessment. Upon his figures that condition is not fulfilled.

The revival of s. 133 of the Act of 1842 and s. 6 of the Act of 1865 is limited, and only enables the taxpayer to claim relief in respect of diminution of profits due to the war. Rowlatt J. was right in his method of arriving at the figure of 36,000%, but wrong in disregarding the provisions of s. 6

(1) See note (1), ante, p. 546.

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 1921 would be to show that the company were not entitled to any
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Disturnal K.C. and *Latter* for the respondents. The respondents are entitled at least to the relief given by Rowlatt J.

Under the Act of 1842, s. 133, the taxpayer, on proving to the Commissioners that his profits for the year of assessment fell short of the computed sum, was entitled to be assessed on the actual profits of the year. That was restricted by the Act of 1865. The machinery of s. 133 of the Act of 1842 and s. 6 of the Act of 1865 has not been modified by s. 13 of the Act of 1914. They are to be applied to their full extent. There is however a condition that it must be proved that the diminution of profits and gains on account of which relief is claimed under the sections is due to circumstances attributable to the war. When that is fulfilled the sections are brought into operation, and it does not matter if the whole diminution is not due to the war. It is suggested that if 1/2 of the diminution is not due to the war the machinery of the revived sections cannot be applied. It is submitted that it is not necessary to prove that the whole loss was due to the war. The Commissioners have not an absolute discretion under s. 133. They must deal with the actual profits of the year of assessment and see how far they fall short of the computed sum.

Sir Ernest Pollock S.-G. in reply.

Cur. adv. vult.

March 21. LORD STERNDALÉ M.R. This appeal from Rowlatt J. raises a difficult question as to the application of the Finance Act, 1914, s. 13, which was passed for the purpose of giving some relief to taxpayers whose profits had been diminished by causes arising from the war. It is as follows: "Section 133 of the Income Tax Act, 1842, and section 6 of the Revenue Act, 1865 (which provide for the reduction of assessments or the repayment of duty in certain cases where the profits of the

year of assessment fall short of the sum on which the assessment has been made), shall, notwithstanding their repeal by section 24 of the Finance Act, 1907, have effect as respects any assessment to income tax for the current income tax year where it is proved to the satisfaction of the Commissioners, by whom the assessment has been made, that the diminution of profits and gains on account of which relief is claimed under those sections is due to circumstances attributable directly or indirectly to the present war, whether those circumstances are a specific cause of the diminution of income within the meaning of section 134 of the Income Tax Act, 1842, or not; and diminution of profits and gains on account of which relief can be given under this section shall not be deemed to be a specific cause authorizing the grant of relief under the said section 134. The foregoing provision, in its application to the case of any person who, in connection with the present war, is or has been serving as a member of any of the military or naval forces of the Crown, or in any work abroad of the British Red Cross Society, or the Saint John Ambulance Association, or any other body with similar objects, shall be construed as if that provision referred only to section 133 of the Income Tax Act, 1842, and contained no reference to section 6 of the Revenue Act, 1865."

The facts in respect of which the question arises are these: The company in preceding years made these profits, stating them in round figures: 1913, 76,000*l.*; 1914, 36,000*l.*; 1915, 16,000*l.*; giving an average profit upon which the company were assessed of roughly 42,000*l.* In the year 1916 there was a loss of 11,000*l.*, making a difference between 1915 and 1916 of 27,000*l.* For the purposes of the case before us it was taken to be the fact that only 6000*l.* of this difference was due to causes arising from the war, the remainder being due to other causes. Rowlatt J. has taken the profits of the year of assessment, 1916, as 36,000*l.*, and has ordered the company to be assessed on the total divided by three of the profits of the year 1914, 36,000*l.*, 1915, 16,000*l.*, and 1916, 36,000*l.*, or, roughly, 29,000*l.* The company by this judgment therefore get relief to the extent of 13,000*l.*, the difference

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 1921 conclusion. Assuming the learned judge's method of ascer-
 YUANMI taining the profits of 1916 and the figure to which that method
 GOLD led him to be correct (which, for reasons to be given later,
 MINES I think they are not), then the company are entitled to no
 v. relief. The learned judge has, I think, overlooked the
 EBOBALL. condition precedent to relief laid down in s. 6 of the Revenue
 Lord Sterndale Act, 1865, to this effect: "And whereas by section 133 of
 M.R. the said Act of the fifth and sixth years of Her Majesty's
 reign"—that is the Income Tax Act, 1842—"provision is
 made for giving relief, by reduction of the assessment, or
 repayment of duty, in certain cases where the profits of the
 year of assessment fall short of the sum on which the assess-
 ment has been made: Be it enacted, that no such reduction
 or repayment shall be made in any such case unless the profits
 of the said year of assessment are proved to be less than the
 profits for one year on the average of the last three years,
 including the said year of assessment; nor shall any such
 relief extend to any greater amount than the difference
 between the sum on which the assessment has been made and
 such average profits for one year as aforesaid." These figures
 on his conclusions are 36,000*l.* and 29,000*l.* respectively,
 and therefore, the former being greater and not less than the
 latter, no reduction in the assessment can be made. I think
 therefore the judgment of Rowlatt J. cannot in any case
 stand.

The object of the Finance Act, 1914, s. 13, is, I think,
 fairly clear and is, for all practical purposes, correctly
 expressed in the sidenote: "Relief in respect of diminution
 of income due to war," but it is so expressed as to be difficult
 to construe, and the object thus expressed could have been
 much more clearly attained by some simple form of words
 without reference to a revival of repealed sections and their
 machinery, if it had been present to the draftsman's mind
 that such a case as this might occur where only a part of the
 diminution of profits is due to causes arising from the war.
 It looks very much to me as though the only diminution
 present to his mind was one due solely to the war, in which

case the section would have worked much more easily. It must be remembered, however, that it was necessary to pass this legislation early in the war, before its economic effects were clearly understood, and without much opportunity of consideration. However that may be, I think it is fairly clear that the object was to give relief against the effect of war losses, and war losses only. Whether the legislation works out so as to effect this object is a matter to be considered.

It was, however, contended by the company that if any part of the diminution of profit by war losses were proved, the taxpayer became at once entitled to the whole benefits of the relief originally given by the revived sections, although the greater part of the diminution might be due to causes wholly apart from the war. I think this contention is wrong; it ignores the words "diminution of profits and gains on account of which relief is claimed under those sections" as read with and explained by the subsequent words "diminution of profits and gains on account of which relief can be given under this section." I think that the taxpayer can only be entitled to relief to the full extent if all the diminution is due to the war. It seems to me that the other construction would require the insertion of some such words as "the diminution or any part thereof." It might possibly be argued on the other side that no relief at all can be given unless the whole diminution is due to the war, but the Crown did not raise this contention but attributed to the section the object which I think was the right one—namely, that relief to the full extent should be given when the whole diminution is due to the war, and when part only is due to the war relief should only be given in respect of that part. How that is to be worked out is a difficult matter, which may possibly, in my opinion, lead to consequences never contemplated.

As the relief is given by reviving two repealed sections of former Acts, it is necessary, I think, to examine the way in which those sections worked. The first is s. 133 of the Income Tax Act, 1842, and is in these terms: "And be it enacted, that if within or at the end of the year current at

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the time of making any assessment under this Act, or at the end of any year when such assessment ought to have been made, any person charged to the duties contained in Sch. D, whether he shall have computed his profits or gains arising as last aforesaid on the amount thereof in the preceding or current year, or on an average of years, shall find, and shall prove to the satisfaction of the Commissioners by whom the assessment was made that his profits and gains during such year for which the computation was made fell short of the sum so computed in respect of the same source of profit on which the computation was made, it shall be lawful for the said Commissioners to cause the assessment made for such current year to be amended in respect of such source of profit, as the case shall require, and in case the sum assessed shall have been paid " then he may claim to get it repaid. This section proceeded on a principle of income tax law then existing, but long since abandoned, that a taxpayer should not be taxed in any year upon a larger income than he had in that year by reason of his having on an average of previous years made larger profits and had a larger income. " Profits and gains during such year," in my opinion, clearly in this section mean actual profits and are to be ascertained not by any calculation from profits of other years but in the ordinary way by an examination of the business books and the preparation of a profit and loss account. It will be observed that when these profits have been ascertained, the average profits of the previous years are relevant for one purpose only—namely, that it may be seen whether they are or are not greater than the actual profit of the year. If they be then the assessment is to be amended as may be required, and the amendment required is the substitution of the actual profits for the average or computed profits contained in it. It matters not whether they are 5 per cent. or 500 per cent. greater than the actual profits and it is not necessary to make any comparison between the two. If the taxpayer should wish for his own satisfaction to know how much his assessment has been reduced he will have to subtract his actual profits from the average or computed profits, but it is only in

this case that he need do this sum ; it is not necessary for the purpose of fixing his liability or the amount of his assessment. I mention this because I think that Rowlatt J. in fixing the actual profits of the company for 1916 has been led into an error by taking the average profits of 42,000*l.* as a factor leading to his conclusion. In that I think he is wrong. If this case depended only on this s. 133, the actual profits of the company upon which they could be assessed would be nothing, because there was, in fact, a loss, and the average profits of 42,000*l.* would be quite irrelevant. The difficulty arises from the fact that the case does not rest upon s. 133 alone, and the taxpayer is only entitled to such diminution as arises from war losses. The method, however, of ascertaining the actual profits of the taxable year is not in any way affected by this difficulty.

The persons referred to in the second paragraph of the Finance Act, 1913, s. 13, if they could show that the diminution of their profits was wholly due to the war would be exactly in the position of the ordinary taxpayer when s. 133 was in force unqualified by the Act of 1865, and would be assessed on their actual profits.

This provision of the Act of 1842 was found to be too favourable to the taxpayer, and, accordingly, it was qualified by the Revenue Act, 1865, s. 6, which imposed two qualifications. I have already read the section: (1.) "No such reduction or repayment shall be made in any such case unless the profits of the said year of assessment are proved to be less than the profits for one year on the average of the last three years, including the said year of assessment," and (2.) "Nor shall any such relief extend to any greater amount than the difference between the sum on which the assessment has been made and such average profits for one year as aforesaid." No difference however is made in the way in which the profits of the year of assessment are to be ascertained; they are still, in my opinion, to be ascertained by the ordinary methods of examination of business books and affairs, and the average of previous years has again no relevancy to their ascertainment; but in this Act it does become relevant to the ascertainment

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of the amount of the altered assessment, because that altered assessment has to be based on that sum less the difference between it and the average of the last three years including the year of assessment. In this case, but for the provision limiting the relief to war losses, the figures would work out in this way. Average profits on which the assessment was based, 42,000*l.* Profits of the three years, including the year of assessment 1914, 36,000*l.*; 1915, 16,000*l.*; 1916, minus 11,000*l.*—average roughly 14,000*l.* The corrected assessment would then be 42,000*l.*, minus 14,000*l.*—equals 28,000*l.* Now we come however to the Act of 1914, which in my opinion limits the relief to diminution of profits arising from the war, but it does so by reviving the Income Tax Act, 1842, s. 133, and the Revenue Act, 1865, s. 6, which had been repealed by the Finance Act, 1907, and refers to them as sections “which provide for the reduction of assessments or the repayment of duty in certain cases where the profits of the year of assessment fall short of the sum on which the assessment has been made.” Therefore it seems to me it recognizes that the profits of the year of assessment are to be ascertained as under those sections when in force—i.e., by the examination of the books and preparation of a profit and loss account for the year, irrespective of what average profits may have been made in previous years, with this exception, that any losses or diminution of profits arising from non-war causes must be excluded from the account.

I think that the calculation of the profits of the year of assessment must be the same for the purposes of all the three sections with which this case is concerned—i.e., it must be a calculation of what the profits in fact were, and that it is not permissible to calculate them by any reference to the average profits or the profits of any preceding year. I think in this case the result is this: If the whole of the loss in 1916 were due to war losses, then the privileged persons mentioned in the proviso in s. 13 would be entitled to have the full benefit of s. 133 and would be assessed at nothing, and those persons who were not within that privileged class would be entitled to the benefit of s. 133 as modified by s. 6 of the Act of 1865.

But the whole of these losses is not due to war losses, and therefore the result of the year's trading of 1916 must be obtained by excluding from the debit side any losses not occasioned by the war. In my opinion this ought to be done by an examination of the books and not by any calculation or comparison based either on the immediately preceding or any preceding years. Assuming that on an examination of the books the result of the trading, excluding non-war losses from the debit side of the account, was a profit of 10,000*l.*, then 10,000*l.* profit would be the right figure to take as the profit of 1916. This examination of books has not however been made, and the only figure of losses given to us is that the war loss is to be taken as 6000*l.* This, however, is an assumed and not an actual figure—the non-war losses for the purpose of this decision must be estimated as best we can on the materials before us. I think that the only way we can make this estimate is as follows: Comparing 1915 and 1916 there was a diminution of profits of 27,000*l.*, changing a profit of 16,000*l.* into a loss of 11,000*l.* Of this 27,000*l.*, according to the assumed figure, 6000*l.* arises from war losses and 21,000*l.* from non-war losses, and, excluding the latter, there would be a profit of 10,000*l.*, the figure I had assumed. I have already said that this in my opinion is not the right method of ascertaining the result of the trading after excluding the debit from war losses, and that the proper method is by an examination of the books. The profits of the preceding year are in no way a measure of the result of the trading of 1916, but as the proper method of ascertaining that result has not been adopted the calculation mentioned above is the only way open to us of estimating them. If it be shown, on a proper ascertainment of the result of the trading, that these figures of 6000*l.*, 21,000*l.*, and 10,000*l.* are incorrect, then the requisite alterations must be made. Until this alteration is made the figures for the three years will be 36,000*l.*, 16,000*l.*, and 10,000*l.*, giving roughly an average of 21,000*l.*—10,000*l.* is less than 21,000*l.*, and therefore the first condition of the Revenue Act, 1865, s. 6, is fulfilled. Then the comparison for assessment is 42,000*l.*, the computed profits on

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which the assessment was made, less 21,000*l.*, the average of three years including the year of assessment, leaving a corrected assessment of 21,000*l.* I feel that this conclusion probably produces a result not contemplated by the framers of the Act of 1914, as it gives in respect of a war loss of 6000*l.* a relief to an extent of $3\frac{1}{2}$ times that amount, and perhaps the framers of the Act meant to allow a deduction from the computed profits only to the extent of the war losses. It would have been quite easy to frame a clause saying that the taxpayer was to be entitled to the relief of deducting his war losses in the year of assessment from his assessment, and that would have effected the result at which the Commissioners arrived by exercising a discretion as to the alteration in the assessment which I do not think they possess. If such a clause had been drafted it would have been quite unnecessary to revive ss. 133 and 6 at all, but the Legislature preferred to revive them, and to employ the machinery contained in them, and I do not think I am at liberty to alter the result which is given by that machinery, because I may think that such a result was not contemplated. To take an instance: If 10,000*l.* be assumed as the actual profit of a privileged person within the proviso of s. 13 after allowing for 6000*l.* war losses, he would under s. 133 be entitled to be assessed at 10,000*l.* only, whereas, if his relief be limited to deducting his war losses from his computed profits, his assessment would be 36,000*l.*, and the working of s. 133, which is specially revived in his favour, would be ignored.

I think therefore that subject to adjustment of figures if the actual profits of 1916 have not been accurately estimated the alteration should be as I have stated it above.

SCRUTTON L.J. This appeal from the decision of Rowlatt J. raises a troublesome question as to the amount of relief which can be given to a trader whose actual income falls short of the conventional income assessed on the average of the previous three years' trading—part of such deficiency being due to the war, and part to other causes. The statutes are somewhat intricate and difficult to interpret, and I state my

views in detail, so that any one who has to consider them may follow the argument. Sect. 133 of the Act of 1842 allowed a trader whose actual income for any year fell short of the conventional income for that year, assessed on the average of the actual income of the three previous years, to prove his actual income to the Commissioners, who thereupon were authorized to correct the previous assessment "as the case shall require." In my view this did not give them discretion to make what alteration they liked, but required them to alter the assessment from the conventional basis to the basis of actual profits. The conventional assessment at the beginning of the year could always be corrected to the actual facts at the end of the year. To make the case clearer, if the actual incomes of four years in thousands were 30, 20, 10 and 0 respectively, the trader who had been assessed for the fourth year on 20,000*l.*, the average of 30,000*l.*, 20,000*l.*, and 10,000*l.*—60,000*l.* divided by 3—would prove his actual income, 0; and the assessment would then be altered from 20,000*l.* to 0. It is important to notice that though his real drop from the previous year was from 10,000*l.* to 0, the conventional assessment, 20,000*l.*, would not be reduced to 10,000*l.* by deducting his actual loss, 10,000*l.*, only; but would be reduced to his actual profits, 0, thus deducting 20,000*l.*, though there had only been a drop of 10,000*l.* in the year. This was found too generous to the taxpayer, so s. 6 of the Act of 1865 imposed certain restrictions on the relief that could be granted him. After reciting the relief where "the profits of the year of assessment fall short of the sum on which the assessment is made" (i.e., the actual profits fall short of the conventional profits), the statute proceeds "no such reduction or repayment shall be made: (1.) unless the profits of the said year of assessment are proved to be less than the profits for one year on the average of the last three years including the said year of assessment." This compares the actual profits of the year with a conventional sum obtained by taking the actual profits of the three years, although for each year there was also a conventional assessment. On the

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figures I have already given, 0, the profits of the year of assessment, is to be compared with the average of 20, 10, 0; that is 30, divided by 3, equals 10. Nought is less than 10, so that in this case the Act of 1865 does not restrict the Act of 1842. But if the profits of the last year had been 16 instead of 0, and the trader was claiming a relief of 4 (20 minus 16), he would fail, for 16, the actual profits of the year of assessment, would not be less than the average of $\frac{20, 10, 16}{3}$ equals $15\frac{1}{3}$.

The second restriction imposed by the Act of 1865 is that there shall be no greater relief than the difference between the sum on which the original conventional assessment has been made, and the three years' average of actual profits including the year of assessment. That is on the figures already given the conventional assessment of 20 (30, 20, 10 = $\frac{60}{3}$) is to be compared with the average of 20, 10, 0, that is 30 divided by 3 equals 10, and no more relief would be given than the difference between 20 and 10. This would cut down the trader's relief, as he was asking for 20, the difference between 20 and 0, and only getting 10, the difference between 20 and 10. As he could never get more relief than would be given by an assessment on the latter three years' average, Rowlatt J. treats the Act as giving a rough rule that this average is substituted for the original assessment; but he seems to overlook the first statutory restriction, which provides that this average is not to be the assessment, unless the actual profits of the year are less. This, it will be seen presently, vitiates the exact process by which he arrives at his result. The Act of 1865 is a restricting Act merely, not giving any actual relief to the taxpayer, but cutting down relief he would otherwise have had under the Act of 1842. He is not to have more relief than would be given if his actual income were the sum obtained by averaging three years' actual income, including the year of assessment, and is only to have that relief if the actual income of the year of assessment is less than that average income.

The next statutory step was that both these Acts were

repealed, and remained so till the outbreak of war, when many traders found their actual profits reduced below the conventional assessment by war. This led to the passing of the Finance Act of 1914, Session 2, s. 13, which gives rise to the present difficulty. Parliament might have simply enacted that proved war losses in any year should be deducted from the conventional assessment in that year, in which case it would be quite clear that the result attained by the Commissioners was the correct one. But they did not take this step; they gave relief by re-enacting repealed legislation and the system of relief under it. The mode of giving relief was to restore, if war losses were proved, and in respect of those war losses only, the operations of the Acts of 1842 and 1865, with this difference that if the trader had served in the war he was not to be subject to the restrictions of the Act of 1865, while if he suffered war losses without having served in the war he had to submit to those restrictions. The difficulty of interpretation arises from the fact that it is not at all clear that the draftsman or Parliament appreciated that a fall in profits might be due partly to the war, and partly to entirely independent causes. At any rate they gave no clear direction as to how such a case should be dealt with.

The Finance Act, 1914, s. 13, recites that the Acts of 1842 and 1865 provide for the reduction of assessments where the (actual) profits of the year of assessment fall short of the (conventional) sum on which the assessment has been made, and enacts that these Acts shall apply where it is proved to the satisfaction of the Commissioners "that the diminution of profits and gains on account of which relief is claimed is due to circumstances attributable directly or indirectly to the present war." It might be suggested that where there is a diminution of profits from the conventional assessment, the whole diminution must be proved to be due to the war before any relief can be claimed. The Crown counsel, however, rightly in my opinion, declined to argue this, and such a construction would give no meaning to the words "in respect of which relief is claimed" in a case where the trader confined his claim to the diminution caused by war. Counsel for the

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trader, however, did boldly argue that if the trader showed any diminution caused by war, he could then bring into consideration all the diminution whether caused by war or not. This view seems so unreasonable and contrary to the intention of Parliament that very clear words would be required to induce me to give effect to it. It seems to me that the only diminution of profits which can be taken into account is that due to the war; that not due to the war must be excluded. The next question is, when you have ascertained the diminution due to the war, and that not due to the war, how are you to use them? In my view they are to be used to obtain the actual profits of the year of assessment, excluding losses not due to the war, and excluding conventional profits, not in fact realised. You know the actual profits of the year before and of the year of assessment. These two actual profits (if the year of assessment is the lower of the two) show the actual loss or fall of profits between the two years. Of this actual loss so much is due to war, so much is not. If you deduct the loss due to war from the figures of the year before, you get the actual profits of the year of assessment excluding losses not due to war. To put it another way, if to the actual profits of the year of assessment you add the figure representing the amount of losses not due to war, you get again the actual profits, excluding losses not due to war. To take the previous figures, if a war loss of 4 is proved, and the profits of the last two years are 10 and 0, of the drop of 10 in profits 4 is due to war, 6 is due to causes outside the war, and the actual profits of the year of assessment, excluding non-war losses, are 10 minus 4 equals 6, or 0 plus 6 equals 6. And that figure, or a figure arrived at in that way, is in my view to be taken as the actual profits of the year of assessment for the purpose both of claim for relief and of the three years' average in the Act of 1865. Such a process excludes from consideration losses not due to the war for which Parliament has not intended to give relief; and gives effect to losses due to the war. With such a figure the restrictions of the Act of 1865 must then be worked out. I apply this construction to the figures of the present case as follows.

The four years showed roughly profits of 76,000*l.*, 36,000*l.*, 16,000*l.*, and a loss of 11,000*l.* The conventional assessment of the profits of the last year on the average of the first three years was 42,000*l.*—128,000*l.* divided by 3. The actual accounts of the last year showed a loss of 11,000*l.* As compared with the actual profits of the previous year, 16,000*l.*, this was an actual drop of 27,000*l.*, of which for the purposes of this case 6000*l.* was to be taken as loss due to war, and 21,000*l.* was therefore the loss not due to war. In respect of this sum of 21,000*l.*, in my view the trader could not claim any relief, and his actual profits for the year of assessment were therefore to be taken at 16,000*l.*, last year's profit, minus 6000*l.* war loss; or minus 11,000*l.*, this year's loss, plus 21,000*l.*, non-war loss—10,000*l.* in either case. That sum would have been his actual profit if he had suffered no losses not due to war, but only the 6000*l.* due to war, and under the Act of 1842 alone he would be able to claim a reduction from 42,000*l.* conventional to 10,000*l.* actual. But the restrictions of the Act of 1865 must then be applied. His actual profits of the year of assessment, 10,000*l.*, must be less than the average of the three years' actual profits, 36,000*l.*, 16,000*l.*, and 10,000*l.* divided by 3 equals 21,000*l.* They are less; this restriction does not hurt him. Secondly, he cannot get more relief than the difference between the above three years' average, 21,000*l.*, and the conventional assessment 42,000*l.*, i.e., 21,000*l.* This does restrict his claim, for instead of getting 42,000*l.*, minus 10,000*l.*—equals 32,000*l.* relief, he is only getting 42,000*l.*, minus 21,000*l.*—equals 21,000*l.* relief. It will be said at once this system gives him 21,000*l.* relief for 6000*l.* loss, but the objection is, I think, based on a misunderstanding. The object of the Act of 1842 is to reduce his conventional assessment to the real facts. As shown in an earlier part of the judgment his real drop in profits in the year may be only to 10,000*l.*, but he would get 20,000*l.* reduction on his assessment under the Act of 1842, because its object is to reduce a conventional assessment not based on the facts of that year to the real facts of that year. The alternative method, merely to reduce the conventional assessment 42,000*l.* by

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6000*l.*, the actual war loss, leaving 36,000*l.* the profits of the year of assessment, seems open to the obvious objection that in no sense is 36,000*l.* the actual profits of the year of assessment. There was actually a loss of 11,000*l.*, or, excluding non-war losses of 21,000*l.*, a profit of 10,000*l.* The sum of 36,000*l.* is a purely conventional figure having no relation to the real facts. For these reasons in my view the relief should be granted, if 6000*l.* is the figure of war loss, as if the assessment of actual profits were 21,000*l.*, instead of the conventional figure of 42,000*l.*

It remains to deal with the views taken below, and the arguments before us. The Commissioners simply deducted 6000*l.* from 42,000*l.*, apparently on the view that they had a discretion as to what was required. How they dealt with the Act of 1865 they do not state. For if 36,000*l.* was the profits of the year of assessment, it was not less than the three years' average, 36,000*l.*, plus 16,000*l.*, plus 36,000*l.* divided by 3 equals 29,000*l.*, and no relief could be given, yet they gave relief. Rowlatt J. thought, as I think, the Commissioners' view erroneous, but I have some difficulty in understanding his own view. He, I think, begins by taking the difference between the conventional assessment, 42,000*l.*, and the actual profits—minus 11,000*l.*—as 53,000*l.*, of which he says only 6000*l.* is war loss, therefore the actual profits are 42,000*l.*, minus 6000*l.*—equals 36,000*l.* This, as he says, is "artificial," but also he thinks "most reasonable." But as I have said you are to reduce the conventional figure to the facts, not to an artificial figure which has no relation to the facts. You are to reduce the figure from an assessment based on an average of three years to an assessment based on the facts of one year. This the method of the judge and the Commissioners seems to me not to do—but still to work on the conventional average of three years, producing a result which is neither average nor fact. But apart from this I do not understand the judge's next step. He says the rule is to substitute for the assessment the average of actual profits of three years, including the year of assessment. He therefore makes an average, 36,000*l.*, plus 16,000*l.*, plus

36,000*l.* divided by 3 equals 29,000*l.*, the last 36,000*l.* being certainly not actual profits, and substitutes 29,000*l.*, the result, for the assessment of 42,000*l.*, giving a return of 13,000*l.* But the three years' average is not a rule imposed by the Act of 1865 ; it is the result of the second restriction, but subject to a proviso which the judge has overlooked, that the actual profits of the year of assessment must be less than the three years' average. But in this case they are greater : 36,000*l.*, which in the judge's view are the profits of the year of assessment, are more than 29,000*l.*, his three years' average. On the judge's figures he should have given the trader no relief, and I think the Crown were right in their appeal against the judge's reasoning, though as appears above I think the true view is different from the view of the judge below, the Commissioners, or the Crown. Counsel for the trader took the bold view that as they had proved some war loss, the whole operation of the Acts of 1842 and 1865 was let in, regardless of the fact that most of the diminution was not due to war. I think this left them in the insuperable difficulty that if they were claiming in respect of the whole diminution of profits and gains, they could not prove that such diminution was due to war.

The actual diminution in profits from the year before to the year of assessment may be severable into two actual figures, the losses due to war, and the losses not due to war. Where relief is claimed the difference between the conventional average of three previous years and the actual profits of the year of assessment may be larger than the actual diminution from the previous year. How is the larger sum to be divided in relation to the two actual losses. An average adjuster would probably say that as war losses 6 are to non-war losses 21, as 2 to 7, or 2-9ths to 7-9ths, he would divide the difference, 53,000*l.*, between actual loss (minus 11,000*l.*) and conventional assessment 42,000*l.* in that proportion, and assess at 30,000*l.*, which is equal to 42,000*l.* minus 2-9ths of 53,000*l.* But this is not based on actuality, and I do not attribute to Parliament the methods of the average adjuster. Another method, that of the Commissioners and the first step

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of the judgment of Rowlatt J., is to subtract the actual war loss from the conventional assessment, and take 36,000*l.* But this is a conventional loss, having no relation to actual facts. If Parliament had meant this it would be simple to say that the trader should have relief as to so much of the conventional assessment as was equal to proved war loss. The third method is to eliminate the actual non-war losses from the actual results, or deduct the actual war losses from the actual last year's profits in order to obtain the actual profits of the year after excluding losses not due to war. This does deal with realities on both sides of the sum, and I think does produce as a result the actual profits of the year, excluding non-war losses, which is the result to be aimed at. Once more to apply the test of figures. If a trader who had served in the war showed profits of 30,000*l.*, 20,000*l.*, 10,000*l.* and 0, and proved war losses in the last year of 10,000*l.*, if the Act of 1842 and nothing else applied to him, his assessment for the last year would be reduced from 20,000*l.* to 0. In my view the Act of 1914, applying the Act of 1842, has the same result, and I cannot regard a method of calculation which, professing to apply the Act of 1842, would merely deduct his actual war losses from his conventional income, and assess him on a conventional 10,000*l.* in a year in which he had made no profits, as a proper working out of the system which Parliament has revived to meet the case.

In my view, therefore, if the figure of 6000*l.* is to stand the assessment should be reduced from 42,000*l.* to 21,000*l.*, and relief given on the basis of that assessment. If the figure of 6000*l.* is altered, the new figure should be used on the above principles. As both sides have in my view put forward erroneous contentions, there should in my view be no costs of this appeal.

YOUNGER L.J. For their trading year ending June 30, 1916, the Yuanmi Gold Mines, Ltd., the respondents here, were confronted with a shortage in profits of no less a sum than 53,000*l.* as compared with the profits in respect of which they were assessed to income tax for the year ending April 5, 1916.

In other words they had on the three preceding years' average been assessed to income tax in respect of the fiscal year 1915-1916 on a profit excluding depreciations of 42,000*l.*, while in their trading year ending June 30, 1916, they had sustained an actual loss of 11,000*l.* Of that shortage of 53,000*l.*, 6000*l.*, and 6000*l.* only, is, so far as we are concerned, to be regarded in the language of s. 13 of the Finance Act, 1914 (Session 2), as being "due to circumstances attributable directly or indirectly to the present war," and the question which on this appeal has to be determined is the extent, if any, to which the respondents are under that section entitled to relief from income tax in respect of that 6000*l.* shortage. The Commissioners have held that the respondents ought to have relief to the extent of the full 6000*l.*; the learned judge has made a declaration, the effect of which will be that in respect of this shortage of only 6000*l.*, the respondents are entitled to relief in a sum exceeding 13,000*l.*; the respondents themselves fix the amount of their relief at, I presume, 29,000*l.*, and the Crown says at the Bar that the respondents are entitled to no relief at all. These divergent views held by the experienced persons concerned upon the question still at issue afford some premonition of its intricacy. In the event, however, it will, I believe, be found that the only difficulty in the last analysis will be to attribute its proper meaning and effect to the expression in s. 6 of the Act of 1865 "the profits of the year of assessment" when that section, in conjunction with s. 133 of the Income Tax Act, 1842, has to be made operative for the purpose of arriving at the precise figure of relief given to the privileged taxpayer by s. 13 of the Finance Act, 1914.

These two sections—ss. 133 and 6—which had then for seven years been repealed were, if I may so say, called out of abeyance by the Act of 1914 for the purpose, and for the purpose only, of s. 13; and to be in a position to answer the final question upon which the issue of this appeal will ultimately turn, it is necessary, in view of the divergent views held with regard to them, to consider the effect and relation of these two sections to each other, first apart altogether from

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the Act of 1914, and next in connection with s. 13 of that statute, from which, as I have said, they now derive their only effective existence. Sect. 133 of the Act of 1842 is, as the learned judge observes in his judgment, a survival of the not irrational view pervading the statute—a view that has gradually disappeared from subsequent and more sophisticated legislation—that people are not to be assessed to income tax in a fiscal year in which they actually make losses or in which they make nothing. The broad effect of the section, which I need not pause to read again, is to my mind clear. It is that if at the end of a year of assessment, it is proved by the taxpayer that his actual profits or gains for the current year of taxation fall short of the average of the previous three years on which in that year he has been assessed to income tax, he shall be entitled to have his assessment amended to represent the actual figures of his profits and gains for the year. But this statement of the effect of the section, which adopts and follows that of the learned judge, leaves implicit one or two matters which in the interests of clearness it is at this point desirable to emphasize. The first is, that the section is one of relief from a previously and otherwise imposed assessment, not only made but in many cases, I should suppose in most cases, actually paid. In the case of the present respondents, for instance, whose financial year ends on June 30, it could never be, until after that date, that any claim to relief from their assessment to income tax on their three years' average for the fiscal year ending on the previous April 5, and presumably already paid, could be made. This consideration is important by reason of the light it throws on one aspect of the present case. The section is a relief section pure and simple; it imposes no burden on the taxpayer when his actual profits are in excess of his assessed profits. When the taxpayer being entitled to relief under it, claims that relief, he is not assessed as on a new return based on actual profits. The result of his application for relief is that the previous assessment is amended, in contradistinction to the case where no such application is made or where, if made, it fails. In these cases the original assessment

stands unamended. In none of the three cases is there a new assessment as on a new application, and in every instance, however it be that the result is reached, what the taxpayer remains liable for is the amount of his original assessment so far, if at all, as it is not relieved against by the operation of the section. The original assessment on the three years' average is and always remains the standard with reference to which the ultimate liability to taxation is ascertained. So I read the section.

Next it is convenient to note that the method, by which under the section there is ascertained the extent of relief to which the taxpayer under it is entitled, is to take what I will call—although the expression is not in terms used in the section itself—the actual profits of the year of assessment, ascertained in the ordinary normal way, and deduct them from the assessed profits of that year ascertained on the three years' average. The result is the shortage or diminution in respect of which relief is given. The process might be reversed. If you knew the shortage beforehand and your desire was to ascertain the figure of actual profits of the year, you would deduct the shortage from the assessed profits. And this subtraction of the shortage from the assessed profits would not only give you the sum in respect of which the section gives no relief, but that sum would necessarily be the actual profits of the year. This follows from the fact that apart from the Act of 1914—and we are now speaking of s. 133 apart from that Act—everything which operates to reduce profit, whether an actual loss or a failure to earn profit—everything finds its place in what I have called the shortage; nothing remains to be brought in further to reduce the remaining profits; the balance of the two is therefore actual profit. It will be found not inconvenient to bear all these aspects of this s. 133 in mind when we come to apply to its working the conditions imposed by s. 13 of the Act of 1914.

Sect. 6 of the Act of 1865 contains provisions as a result of which the full relief given to the taxpayer by s. 133 is in all cases restricted and in some taken away altogether. That

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section provides first that no relief under s. 133 shall be given him at all unless "the profits of the year of assessment" (the expression is used in this section and means "actual" profits) are less than the average of his profits for the year of assessment and the two preceding years. The section provides next that, that condition complied with, no relief granted under the earlier section shall exceed the difference between the assessed profits of the year and such last-mentioned average. Here again it will not be inconvenient to insist before proceeding further upon two features of this section—fairly obvious though they be. The first I have already alluded to. It is that the effect of the section, in every case where it does not extinguish the relief altogether, is necessarily to reduce the relief obtainable under s. 133 apart from it. This follows from the fact that the average rate of profit which is to be deducted under this section from the assessed profit must always exceed in amount the actual profit of the year—which under s. 133 is the sum to be deducted from the same assessed profit in order to ascertain the shortage or diminution under that section. In other words compliance with the first condition of s. 6 necessarily involves this result. The cause of the arithmetical fallacy which the learned judge apparently apprehended might underlie the declaration that he made is, if it exists, to be found here. The necessity of complying with that first condition before this section became operative at all was not drawn to his attention. The result was a declaration which for that reason cannot, as I think, be supported.

Next I would observe that "the profits of the year of assessment," whether in fact ascertained for the purposes of s. 133 before the passing of s. 6, or whether ascertained for the purposes of both sections after the passing of the later Act, were always to be ascertained apart altogether from and entirely independent of the results of any previous year's trading, whether the year immediately preceding, or another. The actual profits of each year stand by themselves; they are brought into contrast with nothing except the three previous years' average in the case of s. 133, and the

two previous years' average in the case of s. 6. Never do they in either case come into contrast with the immediately preceding year as such ; and in my judgment the two sections cannot be worked correctly if they ever are so brought into contrast, or if the results of the previous year are imported so as to affect what would be the actual results of the year in question ascertained without reference to them.

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Lastly I would observe that never after the passing of s. 6, and so long as both ss. 133 and 6 remained in force, was the taxpayer affected by them, and claiming relief under them, assessed to income tax on his actual profits during the year of assessment. His assessment, where there were any profits to assess, was always on a notional sum which in turn was always necessarily greater than his actual profit of the year for the reason already given.

So much for these two sections apart from s. 13 of the Act of 1914. Coming now to that section, its true effect, I think, is in no essential respect obscure. It refers to s. 133 and to s. 6, and provides, if I may shortly paraphrase its terms, that, notwithstanding their repeal by the Finance Act, 1907, these sections shall have effect as respects any assessment to income tax for the current income-tax year where it is proved " that the diminution of profits and gains on account of which relief is claimed under these sections is due to circumstances attributable directly or indirectly to the present war." To this diminution I shall in what remains of this judgment refer for the sake of brevity as " a war shortage " or " a shortage due to the war."

Now in the present case the actual total diminution in profits—ascertained as it would be under s. 133—namely, 53,000*l.*, of course far exceeds the amount of the war shortage—namely, 6000*l.* Sundry aspects accordingly of the words just quoted from s. 13 are not directly applicable to the question we have in this case to answer. It is not, however, irrelevant to the matter in hand to refer to some of these in any attempt to state the general result of the section. And the first observation I would make on the section is that, while the relief given to the taxpayer by it is apparently

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limited in one way only, it is in fact limited in two distinct directions. First of all it will never exceed the actual diminution in his profits. Secondly, it is limited to so much of that actual diminution as the taxpayer can prove to be a war shortage. Now, as to the first: increased profits and gains in other directions may neutralise to the point of extinction the influence of the war shortage in effecting an actual diminution in profits. In that case the section does not operate at all. There is no case for relief. There has been no actual diminution of profits and gains. And again, these increased profits or gains from other directions may reduce, without entirely removing, the diminution which apart from that increase would have resulted from the war shortage. In that case what I may call the restored portion of the war shortage disappears as a war shortage. It becomes irrelevant for the purposes of the section or of the relief thereby given. But, secondly, the actual diminution may, as in the present case, far exceed in amount any diminution attributable to the war shortage. In that case, and this is for present purposes the truly important matter, the claim to relief under the section is limited to the amount of the diminution so attributable. Any further diminution does not, so far as s. 13 is concerned, exist. No reduction in actual profit producing that further diminution has for the purpose and in contemplation of this section taken place; it is as if it had not been sustained.

This aspect of the section, if it be, as I think it is, clear, furnishes the clue, in my judgment, to the solution of this appeal, as will later appear.

Now all this, notwithstanding Mr. Disturnell's argument to the contrary, appears to me to be the clear effect of the words which I have quoted from the section, and the conclusions so far reached are of assistance in enabling one to attribute their correct meaning to the words in it: "the diminution of profits and gains on account of which relief is claimed under those sections," a phrase which calls for interpretation. These words when compared, as they should be, with the later words of the section "diminution of profits and gains on account

of which relief can be given under this section"—for these words, I think, are intended to convey a similar conception—mean, in my judgment, "the diminution of profits and gains on account of which relief is, by virtue of this section, claimed under those sections." It is, I think, necessary to emphasize this point. This construction is at variance with the view taken of the words by the learned judge—a view which I find it difficult to accept. And the point is, in my judgment, of importance, because it explains how it is that the application of this s. 13 to these earlier sections may, in certain instances, qualify what would have been their working apart from s. 13.

Summarizing now the effect of that last section, as so far ascertained, we find that the relief thereby given—the maximum relief be it noted—may be described as being represented by the difference between the assessed profits and the actual profits of the taxpayer for the year of assessment, not, however, exceeding the amount in respect of which that difference represents a shortage due to the war.

And now, having ascertained the extent of the maximum relief given by s. 13, still unaffected by ss. 133 and 6, I desire, before proceeding to apply this result to these two sections, to make three further observations on s. 13. The fact is that, so far as its expressed terms go, it becomes operative only where the whole diminution in the profits and gains of the taxpayer is attributable to a war shortage. Where the diminution is only partially so attributable the section is not, so far as express words go, brought into play at all. Now, as it happens, there is no difficulty whatever, as will immediately appear, in applying to ss. 133 and 6 the provisions of s. 13 if these provisions be confined to the case where the actual diminution is entirely attributable to a war shortage; the difficulty only arises if the section be extended to a case where the diminution is only partially so attributable; and while I entirely agree that the section ought to be held to be so extended if it is to have the full beneficial operation presumably intended by the Legislature, I desire to guard myself against

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the conclusion that it is so in fact extended until I have ascertained whether as so extended it can be applied to ss. 133 and 6 without an increase of its benefits being thereby involved which are in excess of the maximum relief conceded by it as above set forth. For my view, rightly or wrongly, is, that this condition is fundamental. Any relief in excess of a war shortage is, I think, expressly excluded by the section. No extension of its expressed terms is permissible if such extension would lead to that result.

The second observation with regard to s. 13 which I desire to make is that it revives ss. 133 and 6 without express amendment in any particular. These are restored for its service with their mutual relations to each other unchanged and unimpaired, modified only in working where necessary to the extent above indicated.

Thirdly, and this is the last observation I desire to make on s. 13, the relation between the two sections—ss. 133 and 6—which necessitates the consequence that the relief under s. 6 where that section applies must always be less than the relief under s. 133, where it does not, is, in express terms, recognized and maintained in s. 13. The section provides: "The foregoing provision, in its application to the case of any person who, in connection with the present war, is or has been serving as a member of any of the military or naval forces of the Crown, or in any work abroad of the British Red Cross Society, or the Saint John Ambulance Association, or any other body with similar objects, shall be construed as if that provision referred only to section one hundred and thirty-three of the Income Tax Act, 1842, and contained no reference to section six of the Revenue Act, 1865." That is to say these specially privileged persons are to have a remission more extensive than that conceded to all others than themselves inasmuch as these others are placed under the restrictions of s. 6, while they are not so placed. It follows that no application of s. 13 to ss. 133 and 6 which would result in securing for the taxpayer who is under s. 6 a greater benefit than, or even an equal benefit with, another in the same position but not caught by that section, can be justified as authorized by

s. 13. It further follows that no such application would be justified as would result in the taxpayer, whose case is controlled by s. 6, receiving by way of abatement so much as his proved war shortage. The sum receivable by him must always be a lesser sum than that.

We are in a position now to proceed to try to apply to this war shortage of the respondents, ascertained under s. 13, the machinery provided by ss. 133 and 6 so as to determine the relief, if any, to which they are entitled under the three sections taken together.

The necessary facts to be remembered here are that the war shortage is to be taken at 6000*l.*; the sum to which the respondents were assessed to income tax for the year ending April 5, 1916, was 42,000*l.*; the respondents' actual profits for their trading years ending June 30, 1914, and June 30, 1915, were respectively 36,000*l.* and 16,000*l.*; and their trading operations in their business year ending June 30, 1916, resulted in a loss of 11,000*l.* Now in order to test the true position it will in the first instance be convenient to make an assumption entirely contrary to the fact—to assume, namely, that the actual 6000*l.* war shortage was in fact responsible for the entire difference between the profits of the respondents in their business year ending June 30, 1916, and the sum of 42,000*l.* to which in the fiscal year 1915–1916 they were assessed to income tax on the basis of the average of the previous three years. In other words, let it be assumed that their actual trading results for this business year 1916 realised a profit of 36,000*l.*

On that assumption the working of the three sections presents no difficulty at all. Their war shortage represents the respondents' total shortage. Under s. 133 the respondents' right to relief extends to the whole shortage of 6000*l.*; that sum would be deducted by the Commissioners from 42,000*l.*, their assessed profit for the year; the remaining 36,000*l.* being on one view of that sum the part of their assessed profits in respect of which the section gives no relief, and being also on another view of it their "profits of the year of assessment," their actual profits of that year—because for

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this purpose the fact that their trading year ends on a different date is ignored. But under s. 6 this relief of 6000*l.* so far conceded is entirely cancelled. 36,000*l.*—"the profits of the year of assessment"—far exceed the average of the three years: 36,000*l.*; 16,000*l.*; 36,000*l.* (assumed), that is to say 29,000*l.*; and accordingly in the language of s. 6 "no such reduction or repayment"—allowed, that is, under s. 133—"shall be made." The result is that here, if in the year in question the respondents' whole shortage had been this 6000*l.* war shortage, they would have been entitled to no relief at all.

Next, let it be taken, as the fact is, that this war shortage of 6000*l.* was only part—in fact a very small part—of the total shortage in the respondents' profits in their business for the business year ending June 30, 1916. And to test the working of the sections on this footing let it first be assumed that the respondents, confronted with this shortage, had been, not a mining company but a soldier or a sailor, a privileged person made free of s. 6 by the express provisions of s. 13. Here again the position of the respondents on that footing would, as I see it, have been not doubtful. Their war shortage, falling to be dealt with under s. 133 alone, they would under that section obtain relief to the full extent of the 6000*l.*, the maximum amount which under s. 13 they can demand. And as in this assumed case we know the amount of the shortage, we can, as I have already shown, merely by deducting it—6000*l.*—from the 42,000*l.* assessed profit, ascertain the 36,000*l.* as being the part of that assessed profit from which the section, by way of relief, concedes no further reduction. The respondents therefore remain chargeable with income tax on that sum, whether it is or is not "profit of the year of assessment." They remain so liable because s. 133 leaves the charge upon that balance of their assessed profits imposed by the other provisions of the Act unaltered and untouched. Even as privileged persons, therefore, their relief is for no more than 6000*l.*, although *ex hypothesi* their total shortage from their assessed profit is as much as 53,000*l.*

Now let us take the precise case of the respondents. They are not governed by s. 133 only. Sect. 6 also applies to them, and under that section before it can be worked, "the profits of the year of assessment," meaning thereby their actual profit, must be ascertained and applied in the calculation. Now what, having regard to s. 13 of the Act of 1914, for whose service alone s. 6 is now operative, must be taken to be the amount of these actual profits? In my judgment, although in fact the operations of the respondents in the year in question resulted in an ascertained loss of 11,000*l.*, their "profits of the year of assessment" are in the working of the two sections to be taken at the same sum as that at which they actually stood in the case first above supposed—that is where the respondents' 6000*l.* war shortage was their only shortage—namely, they are to be taken at 36,000*l.*

This, of course, is the crux of the whole case. Everything hitherto said or pointed at in this judgment has been converging upon and leading up to this solution of the difficulty when it finally presented itself, as it does now; and in the observations already made the justification, if any there be, for the answer just given to this question will be found.

If we ask ourselves why it was that the first case above posed presented no difficulty, we find the answer to be that, as in that case the respondents' war shortage of 6000*l.* was their only shortage, s. 13 in fact called for no variation whatever in the literal working of ss. 133 and 6 apart from it. But so soon as we find that the 6000*l.* war shortage of the respondents is not their only shortage, and at the same time realise that s. 13 precludes the grant of any relief from the assessed income tax in excess of that sum being made in respect of it, we see that the resultant figure of 36,000*l.* which in each case is the same—as a sum it does not vary because it is the difference as above explained between the 6000*l.* war shortage and the 42,000*l.* assessed profit—no longer represents in the full sense of the words the actual profits of the year of assessment, but is or may be composed of two

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items (a) shortage due to other causes—and it may not, as we see here, exhaust that shortage—with or without (b) balance of actual profits. But s. 13 ignores as a diminution justifying relief all shortage under (a), that is shortage due to other causes. The only shortage now to be considered under ss. 133 and 6 is, by virtue of s. 13 as above interpreted, that shortage for which relief can be claimed thereunder by virtue of that section, i.e., war shortage. From this it follows, as it seems to me necessarily, that in the working of these sections in connection with s. 13 every other shortage must be treated as non-existent, that is to say, the amount representing it must be treated as never having ceased to be included in the actual profits, amongst which accordingly for the purposes of all calculations that amount must still be considered to remain part. Of course if the ss. 133 and 6 were to be worked apart from s. 13 all these shortages due to other causes would have been added to the 6000*l.*, reducing the 36,000*l.* to a corresponding extent. But by reason of s. 13 they are not shortages to be relieved against at all. They cannot therefore be added as such to the 6000*l.* For a similar reason they cannot be withdrawn from the 36,000*l.*—treating that sum as actual profit—because they represent a failure to make profit which is not by s. 13 recognized as having occurred. In other words that sum which was in actual fact the actual profit of the year of assessment where the war shortage was the only shortage, is necessarily, if s. 13 is to have its full and proper effect, treated as unaltered where the war shortage was only part of the respondents' shortage. There is one intermediate case to which allusion has already been made—namely, where that shortage has been made good in whole or in part from some other source of revenue, in which case the profits would be taken at their actual figure, and the difference, if any, between them and the assessed profits would be the only war shortage in respect of which relief could be claimed. And this last consideration leads me to observe that in the working of these three sections, whether the war shortage be or be not the only shortage, the only purpose I conceive to be necessary in actually ascertaining the profits

of the year is to make sure that the alleged war shortage has not in whole or in part been made good from some other source. If it has not, the effective figure representing the profits of the year is always, for the reason I have given, the difference between the assessed profit and the war shortage. The truth is that unless the procedure above indicated for arriving at the profits of the year of assessment be on the proper construction of the three sections permissible, you will, conceal the fact how you may, be granting under s. 6 relief in respect of a shortage some part of which is not a war shortage at all, relief which is beyond the purview of s. 13 altogether. But speaking for myself, I find little difficulty in reaching this, as I think, the only permissible solution, as a mere matter of construction. The fact that every shortage other than a war shortage has under s. 13 no existence as a subject of relief is to my mind sufficient justification for holding, as a mere matter of interpretation, that in the conjoint working of s. 13 with ss. 133 and 6 every such shortage is deemed to remain part of the profits of the year and is properly included in that expression.

And one may reach the same result in another way. I have already called attention to the necessary identity in the working of the two ss. 133 and 6 between the sum which represents the portion of the taxpayers' original assessment against which no relief is given by s. 133 and the sum representing his profits of the year of assessment under s. 6. There can, I think, be little question, as appears from the second case above posed, that in the present instance 36,000*l.* represents the first of these sums. From that it is a very short step to accept an interpretation of the phrase "profits of the year of assessment" which would result in its representing also the second of them.

The conclusion of the whole matter, therefore, is that the respondents, where this war shortage of 6000*l.* is only part of their shortage, are in the same position as they would have been had it been their only shortage, that is to say, they are entitled to no relief at all. It would indeed be strange if they were so entitled in the one case and not in the other.

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It would be strange if the measure of their relief were to any extent to depend upon what, so far as the benefit given by s. 13 is concerned, is the merest accident. Any plausibility in the view that this accident ought to make a difference is the fact that, unless it does, the respondents here will be left to pay income tax on an assumed profit when in fact they are heavy losers. But the answer is that that result does not flow from these three sections which are not charging sections at all, but are sections of limited and only limited relief. The hardship in the respondents' position, if any there be, arises under other statutory provisions, the operation of which is not to the necessary extent modified by these sections of relief. Their position is in respect of that assessment exactly the same as that of every other taxpayer, no part of whose actual shortage is a war shortage.

Taking as I do this view of the effect of the three sections as they touch the matter in hand, and arriving as I do at a result which makes their working as consistent and harmonious where the war shortage is not the only shortage of the taxpayer as where it is, I feel in no way constrained to withdraw the concession above provisionally made that s. 13 notwithstanding its literal terms may properly be extended to a case where the war shortage to be relieved is only part of the shortage sustained. But if I had felt compelled, as a matter of interpretation, to accept say Mr. Disturnal's suggestion that the profits of the year of assessment may more properly be reached by deducting the 6000*l.* war shortage from the actual profits of the previous year, and by bringing the figure of 10,000*l.* so reached into the calculation directed by s. 6, then I should have felt constrained to withdraw that provisional concession on the ground already stated that the extension of s. 13 to a case not in terms within it had carried with it a consequence in direct infringement of the limitations of the section.

But speaking for myself I am unable to accept that suggestion of Mr. Disturnal's, or any other of similar import. Apart from the fact that the sum reached by that method as the profits of the year of assessment in no sense, whether

actual, notional, or constructive, represents them—in itself an all-sufficient objection—the conclusion is reached by introducing for the purpose of arriving at the profits of one year the results of the working of another, which, as I have endeavoured to show, is in these sections neither recognized, contemplated, nor, as I think, permissible. In no circumstances in my judgment can the actual profits be properly ascertained in any other than the ordinary way; and if, as is assumed, the war shortage of 1916 was 6000*l.*, while the respondents' loss on trading was 11,000*l.*, there can in my view be no method of manipulation of figures, either of another year's trading or otherwise, by which the actual result can properly be made to be other than it is—namely, that the result of the company's trading for the year, not attributable directly or indirectly to the war, resulted not in a profit of 10,000*l.* or any other sum, but in a loss of 5000*l.*, while the diminution in its profits and gains not so attributable was, compared with its assessed profit of 1915–16 on the three years' average, 47,000*l.*, and, if at all material, 21,000*l.* as compared with the results of 1915 only. Further, to place upon the actual profits of the year 1916 any such sum as 10,000*l.*, being unjustified, destroys also the identity between the resultant sum under s. 133 and the profits of the year under s. 6—the maintenance of which is fundamental for the correct working of both sections, and the continuance of which under s. 13 is assumed and utilised under that section. Once destroy or alter that fixed relation, and it will or may result that the privileged persons under s. 13 only receive an equal benefit with or even a less benefit than persons in the same case not so privileged; that taxpayers where the war shortage is their only shortage will or may receive in respect of it less than they would when it is only part of the shortage, and, in the latter case, will or may receive relief upon a sum actually in excess of the war shortage sustained, so that merely because they have sustained some war shortage, they are, in respect of a further shortage, given a relief which to no other taxpayer called upon to face a similar shortage is conceded. If any of these results may necessarily follow—

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and only by an accident and in the rarest cases is one or more of them not inevitable—then it is, I think, clear that s. 13 can have no application to the position from which they flow, that is where the war shortage is part only of the total shortage. In this view of the matter also it would accordingly in my opinion follow that the respondents here are entitled to no relief; s. 13 does not apply to their case.

In my opinion therefore this appeal of the Crown should be allowed and it should be declared that the respondents on the figures stated in the case are entitled to no relief from income tax under s. 13 of the Act of 1914, in respect of the year in question.

I would only add that this judgment is little more than a reasoned justification for the same conclusion upon the main point discussed as that at which the learned judge also, as I read his judgment, arrived. Had the learned judge not failed to recognize and give effect to the limitations of s. 6 he would, as I read his judgment, have made an order in the terms I have just indicated as suitable and proper.

Solicitor for the appellant : *The Solicitor of Inland Revenue.*
Solicitors for the respondents : *Broad & Son.*

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Adulteration—Drugs—Defence—Written Warranty—Warranty after Date of Contract—Quinine Wine—Label on Covering of Bottle—Capsule on Cork—Invoice—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25.

The written warranty mentioned in s. 25 of the Sale of Food and Drugs Act, 1875, in order to protect the seller of an article not of the nature, substance, and quality demanded by the purchaser, must have formed part of the contract under which the seller purchased the article from his vendor, as having been 'given either when the contract was made, or, if afterwards, then in pursuance of a term in the contract that it should be given.

By an oral contract a pharmaceutical chemist bought from the manufacturers through their traveller a dozen bottles of quinine wine to be made according to the British Pharmacopœia. He afterwards received from them a written invoice for the wine in which it was described as quinine wine so made. The wine was delivered to him a day or two later. The cork of each bottle was sealed with a capsule, and on a label pasted round the paper covering the bottle was this printed notice: "Made according to the British Pharmacopœia, . . . we wish to state that our orange quinine wine contains no salicylic acid or other similar material, introduced for keeping purposes or in lieu of deficiency of alcohol, but is pure orange wine made by fermentation and matured by age. . . ." Subsequently, the chemist sold to an inspector a bottle of the wine which on analysis was found not to be quinine wine of the British Pharmacopœia. The chemist was charged on an information under the Sale of Food and Drugs Act, 1875, with having sold to the prejudice of the purchaser a drug, to wit the said bottle of quinine wine, which was not of the nature, substance, and quality demanded by the purchaser; and he relied upon the label and invoice as constituting a written warranty under s. 25 of the Act. The justices dismissed the information. On appeal:—

Held, that the notice and/or invoice, assuming that on their construction they contained a warranty that the article sold was quinine wine of the British Pharmacopœia, did not constitute a "written warranty" to that effect within the meaning of the section, seeing that they did not form part of the contract under which the chemist had bought the article, as they had neither been given when the contract was made, nor afterwards in pursuance of any stipulation in the contract that they should be given.

Iorns v. Van Tromp (1895) 64 L. J. (M. C.) 171 [the plaintiff's name is spelt *Jiorns* in that report] applied.

Lindsay v. Rook (1894) 63 L. J. (M. C.) 231 observed upon.

Semble, per Avory J., that the label and invoice did not on their true construction contain a warranty that the article sold was quinine wine of the British Pharmacopœia. Per Salter J., that these documents, and even the label alone, did contain a warranty to that effect.

CASE stated by justices for the City and County of Kingston-upon-Hull.

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An information was preferred by Charles Jeynes (hereinafter called the appellant), an inspector of food and drugs and an inspector of nuisances for the said city and county, against Edward Hindle (hereinafter called the respondent), a pharmaceutical chemist, whose shop was in the said city and county, for that the respondent did on June 22, 1920, at his said shop, unlawfully sell to the prejudice of the purchaser, the appellant, a certain drug, to wit, a bottle of quinine wine which was not of the nature, substance, and quality demanded by the purchaser.

On August 12, 1920, the information was heard by the justices when the following facts were proved by the appellant, or admitted by or on behalf of the respondent.

On June 22, 1920, the appellant went to the respondent's shop and requested to be supplied with a bottle of quinine wine. He was served by one Smithson, an assistant and agent of the respondent, who first produced a bottle of "wincarnis with quinine." The appellant refused to purchase that saying it was not the sort he wanted, and asking for the proper quinine wine. The assistant then produced a bottle of orange quinine wine for which the appellant paid him 3s. 2d. The appellant then disclosed to the assistant that he was an inspector and had bought the quinine wine for analysis. The respondent then came forward, and the appellant again stated that he was an inspector and had bought the quinine wine for analysis. The respondent called the appellant's attention to the fact that the cork was sealed over with a capsule which had not been tampered with. On a label pasted round the paper covering the bottle was the following printed notice partly in red ink and partly in black ink beneath the name of the manufacturers: "Made according to the British Pharmacopœia. In reference to the prosecution in the case of salicylated quinine wine as reported in the *Chemist and Druggist* of December 4th, 1897, we wish to state that our orange quinine wine contains no salicylic acid or other similar material introduced for keeping purposes, or in lieu of deficiency of alcohol, but is pure orange wine, made by

fermentation and matured by age, and contains no injurious ingredients."

The quinine wine was divided by the appellant into three parts, and all the formalities required by s. 14 of the Sale of Food and Drugs Act, 1875, were complied with. The third sample was produced in Court, together with the original bottle with the remains of the sealing capsule, and bearing round it the label above referred to.

The sample submitted for analysis was analysed by the public analyst for the said city and county, and in his certificate, which was produced in Court, he stated (*inter alia*) that the sample contained the following parts per cent.: (grammes per 100 ccs.), quinine hydrochloride 0.19, salicylic acid 0.04, solid extractive matters 19.86, absolute alcohol (ethyl hydroxide) 3.58, water 76.33—Total 100.00; and that the sample was deficient in quinine hydrochloride to the extent of 17.0 per cent., and deficient in alcohol to the extent of 62.3 per cent., and contained salicylic acid equivalent to 3.5 grains per pint added as a preservative.

The following is the formula for quinine wine given in the British Pharmacopœia (1914 ed.), p. 455: "Vinum Quinine. Quinine Wine. Quinine hydrochloride 2 grammes. Orange wine 875 millilitres. Dissolve; filter if necessary."

It was admitted by the appellant that the provisions precedent to the use of a warranty or invoice as a defence required by s. 20, sub-s. 1, of the Sale of Food and Drugs Act, 1899, had been fully complied with.

In para. 10 of the case it was stated that it was proved by the respondent that the bottle of quinine wine in question was one of a dozen similar bottles he had purchased on July 4, 1919, from the traveller of Messrs. Hirst, Brooke & Hirst, Ltd., manufacturing chemists, Leeds, with other goods in the ordinary course of business; that the quinine wine was to be "quinine wine B.P.," made according to the British Pharmacopœia, and was sold as such; that the respondent had not received from the manufacturers any written warranty other than an alleged warranty contained on the hereinbefore-mentioned label and capsule on the bottle;

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that the goods were delivered in the ordinary course of carriage a day or two after July 4, 1919, and each bottle then bore the label above mentioned; that the respondent sold the quinine wine in the same condition as he received it, and believed it to be genuine wine made according to the British Pharmacopœia; and that the manufacturers wrote to the respondent stating that they assumed full responsibility for the wine and authorizing him to show their letter to the Court.

After the respondent had made the contract with the manufacturers he received from them an invoice dated July 4, 1919, which stated that he had bought of them (*inter alia*)
 “1 doz. 6.s O.Q.Wine H.B.H.
 £1 8s. 0d. . . . Carriage paid Net.”

It was contended on behalf of the respondent that he was protected by the capsule and label, and that these together with the invoice were a sufficient warranty under s. 25 of the Act of 1875. (1)

It was contended on behalf of the appellant that no written warranty had been given by Hirst, Brooke & Hirst, *Ld.*, to the respondent at the time of his purchasing the quinine wine in July, 1919, or any other time; and that the printing on the capsule and the label on the bottle together with the invoice was not a sufficient warranty to comply with s. 25 of the Act of 1875 (1), and he could not claim the protection of that section.

The justices were of opinion that the printed matter

(1) Sale of Food and Drugs Act, 1875, s. 6: “No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds”; provided as therein mentioned.

Sect. 25: “If the defendant in any prosecution under this Act prove to the satisfaction of the justices or court that he had purchased the article in question as the same in

nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he shall have given due notice to him that he will rely on the above defence.”

contained in the capsule and label on the bottle together with the invoice constituted a sufficient warranty required by the section, and they accordingly dismissed the information.

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Scholefield for the appellant. There was no evidence before the justices that the respondent purchased the article in question with a written warranty within the meaning of s. 25 of the Sale of Food and Drugs Act, 1875. The label, invoice, and capsule do not nor does any of these constitute such a warranty. It is agreed that it is not necessary that the word "warranted" should be used in order to constitute a warranty provided the language used imports a warranty: per Charles J. in *Laidlaw v. Wilson*. (1) The warranty must however be part of the contract: *Iorns v. Van Tromp* (2), or there must be evidence that the document relied on was given in pursuance of an antecedent agreement that a warranty should be given, as in *Irving v. Callow Park Dairy Co.*; *Bacon v. Same*. (3) The case of *Lindsay v. Rook* (4) is against the appellant's contention; but that case is inconsistent with the other cases and must be treated as of doubtful authority: see Halsbury's Laws of England, vol. xv., p. 27, note (l). There is no consideration for a warranty given after and not in pursuance of the contract of sale.

[*Hawkins v. Williams* (5) was also referred to.]

Hurst K.C. and *Frampton* for the respondent. The respondent brought evidence which fully satisfied the justices that he purchased the quinine wine in question from the manufacturers as the same in nature, substance, and quality as that demanded of him by the prosecutor—namely, as quinine wine of the British Pharmacopœia: and with a "written warranty" to that effect within the meaning of s. 25 of the Act of 1875.

It was proved that the contract under which the respondent purchased the quinine wine provided that it was to

(1) [1894] 1 Q. B. 74, 77.

(3) (1902) 87 L. T. 70; 66 J. P. 804.

(2) 64 L. J. (M. C.) 171.

(4) 63 L. J. (M. C.) 231.

(5) (1895) 59 J. P. 533.

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be "quinine wine B.P. made according to the British Pharmacopœia." These are not words of mere description, but of warranty, and it was thus proved that the respondent purchased the article with a warranty that it was the same in nature, quality, and substance as that demanded of him. As the contract was oral, it is true that the warranty was not a written warranty at the time of the contract. In order that there may be a written warranty within the section it is not, however, necessary that there should be a warranty in writing in the first instance. Where the original contract is oral, a warranty in the contract or even a stipulation in the contract to give a warranty, if followed by a written warranty on the article when delivered, will constitute a "written warranty" within the section: *Irving v. Callow Park Dairy Co.*; *Bacon v. Same.* (1) The case of *Iorns v. Van Tromp* (2), where it was held that the defendant was not protected by the section, is distinguishable, for in that case there was no warranty or stipulation for a warranty in the contract between the defendant and his vendor, though a written warranty had apparently been given to that vendor by the manufacturers from whom he bought the article.

Even if the contract under which the respondent purchased the quinine wine did not on its true construction contain express words of warranty, yet as there was a warranty in writing on the article when delivered and in the invoice which was sent in respect of it, it ought to be assumed that that warranty in writing was given in pursuance of an implied stipulation in the contract and therefore that there was a "written warranty" within the meaning of the section: *Lindsay v. Rook* (3); *Lewis v. Weatheritt* (4); *Hawkins v. Williams.* (5) In *Lindsay v. Rook* (3) by an oral contract the appellant bought from the manufacturers a barrel of vinegar, on which when delivered there was a label containing a warranty, and it was held that there was a "written warranty"

(1) (1902) 87 L. T. 70; 66 J. P. 804.

(2) 64 L. J. (M. C.) 171.

(3) 63 L. J. (M. C.) 231.

(4) (1909) 100 L. T. 367; 73 J. P.

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(5) 59 J. P. 533.

within the section. The authority of that case has not been weakened by any subsequent case, and it governs the present case.

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LORD COLERIDGE J. This case involves only one short point. The respondent purchased verbally a certain article—namely, quinine wine—from a firm of manufacturers. It was to be quinine wine made according to the British Pharmacopœia, and was sold as such. That is what took place verbally at the time of the purchase. Subsequently the respondent received an invoice which set forth that this was bought of Hirst, Brooke & Hirst, Ltd., manufacturing chemists. Then afterwards when the article was delivered, it was delivered in bottles, each bottle with a certain capsule over the cork and a label pasted round the covering of the bottle, and this label contained the following notice: [His Lordship read the notice as set out above and continued:] The appellant, an inspector, bought a bottle of the wine from the respondent. The article purchased by the appellant turned out to be adulterated. The respondent was prosecuted under the Sale of Food and Drugs Act, 1875, and he alleged in defence that he was protected by s. 25 of that Act. (1) The only question which we have to decide is whether, within the meaning of that section, the respondent upon the facts so stated, purchased the article with a written warranty that it was the same in nature, substance and quality as that demanded of him by the prosecutor. The essential point is whether or not the label pasted on the article supplied, which was all that could be said to be a written warranty, constituted a written warranty of the respondent having purchased the article as the same in nature, substance, and quality as that demanded of him. The cases, to state their effect shortly, seem to show that the written warranty must be part of the contract of purchase. That construction has been enlarged to include two kinds of contract, the one that in which a written warranty has been given at the time of the purchase, the other that in which a written warranty has been given

(1) See note (1) ante, p. 584.

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at a subsequent date in pursuance of a stipulation forming part of the contract of purchase, that such written warranty should be produced. A number of cases have been cited before us which deal with this rather knotty point. The last case dealing directly with this point is *Iorns v. Van Tromp* (1), and the pregnant portion of what Cave J. said in that case contains the following: "Where there is a written warranty in the first instance, then a label such as appears on these canisters of ginger may be regarded, but not otherwise." That is a statement to the effect that where there is a written warranty in the first instance, then the label which contains the warranty may be read into the contract, and, so to speak, dated back to the time of the original purchase; but, as the learned judge says, "not otherwise." That seems to me to be the governing case on this subject. There are other cases which deal very minutely with the particular point involved, but they are all, with the possible exception of *Lindsay v. Rook* (2), in more or less complete agreement with the decision in *Iorns v. Van Tromp*. (1) For instance, there is the case of *Hawkins v. Williams* (3), where the ground of the decision of Lord Russell of Killowen was that the proper inference to be drawn from the facts in the case was that the vendor was giving the document in question—which was an invoice describing certain butter as "guaranteed pure," and initialed by the merchants—as a written warranty in pursuance of a stipulation by the purchaser for that object. In my view the word "stipulation" cannot have any other reference than to a verbal contract at the time of the purchase that that written guarantee should be given. There is the case of *Bacon v. Callow Park Dairy Co.* (4); that is the principal decision on the question whether or not the label on a churn of milk was sufficient compliance with the statute. Lord Alverstone there said (5): "The broad view of the statute is that it is necessary to prove that there was a purchase by the defendant under a warranty which justifies the resale.

(1) 64 L. J. (M. C.) 171, 173.

(3) 59 J. P. 533.

(2) 63 L. J. (M. C.) 231.

(4) 87 L. T. 70.

(5) *Ibid.* 72.

Why should it be suggested that the contract to give a warranty must be in writing?"—the point there being whether or not a verbal contract to give a guarantee was not a sufficient compliance with the statute. "That there must be a written warranty is plain. All the section requires is that it must be proved that the milk was purchased as that demanded, and that there should be a written warranty to that effect." Observe the language is not "that there has been" or "that there was," but "that there should be," implying the stipulation as defined by Lord Russell of Killowen. "But in the case of an article that can only be produced day by day, common sense and the words of the section point to the state of things that we have here—namely, an agreement to put a written warranty on every churn." (1) That justifies the proposition that the statute is sufficiently complied with, if at the time of the contract there is a verbal agreement that a written warranty should be forthcoming. Here there was certainly no written warranty at the time of the purchase, and, according to the statement of the case, there was no verbal contract at the time of the purchase that there should be a written guarantee. All that has taken place is that there has been a sale by representation and that subsequently a written guarantee was forthcoming. In my judgment that does not comply with the strict letter of the statute according to the decisions I have referred to. It appears to me that the appeal should be allowed.

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AVORY J. The respondent in this case was summoned for selling to the purchaser a bottle of quinine wine which was not of the nature, substance, and quality demanded by the purchaser. It was proved by the certificate of the analyst, that what was sold could not properly be described as quinine wine. The respondent therefore had to rely upon s. 25 of the Act of 1875 (2), and to endeavour to show that he had bought this article with a written warranty, as the same in nature, substance, and quality as that demanded of him by the prosecutor. The justices held that he had done so, and

(1) 87 L. T. 72.

(2) See note (1) ante, p. 584.

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the question which has been argued before us is whether they had before them any evidence upon which they could properly find that the respondent was protected by the provisions of s. 25. The written warranty which is relied upon in this case is a label which was attached to the bottle of quinine wine when it was sold to the appellant, the inspector, and which had been attached to it at the time when it was delivered to the respondent by his vendor. It has been suggested that because, when the article was delivered, there was a written warranty attached to it, that was a sufficient compliance with the section. In my opinion the effect of the decisions is that this section is not complied with by the person who is accused proving only that the article, when it was delivered to him, was delivered with a written warranty. That indeed is the actual ground upon which many of the cases have been decided. The cases decide that it must appear, not that there was a written warranty when the article was delivered, but that it was one of the terms of the contract of purchase that there should be a written warranty. The question here is whether there was in this case, as a term of the contract of purchase, a term that there should be a written warranty that this should be, or that this was, quinine wine made according to the British Pharmacopœia. I think the question may be tested in this way: would the contract, which undoubtedly was a verbal contract and is set out in para. 10 of the case, have been complied with if orange quinine wine, or quinine wine made according to the British Pharmacopœia, had been supplied without any label or written warranty upon the bottle? If the contract would have been complied with, without any such label or written warranty on the bottle, then it was not a term of the contract that there should be any such written warranty. From para. 10 of the case, it is clear that that contract would have been complied with if quinine wine, made according to the British Pharmacopœia, had been supplied, although there had been no label on the bottle containing a written warranty.

It may be said that this decision turns upon narrow ground,

and I only call attention to the terms of this label which is relied on for the purpose of showing that the case might have been decided upon a still more narrow ground. I very much doubt whether the label in itself amounts to a written warranty that this was quinine wine made according to the British Pharmacopœia. The terms of the label are these: it begins "Made according to the British Pharmacopœia," but it does not say what it is that is made according to the British Pharmacopœia. It goes on: "In reference to the prosecution in the case of salicylated quinine wine, as reported in the *Chemist and Druggist* of December 4th, 1897, we wish to state that our orange quinine wine contains no salicylic acid, or other similar material introduced for keeping purposes, or in lieu of deficiency of alcohol, but is pure orange wine"—not "quinine wine"—"but is pure orange wine, made by fermentation and matured by age, and contains no injurious ingredients." Of course, I have assumed that that is a correct copy of the label, as we have been told that it is believed to be so. It seems to me that that label cannot be relied upon as a written warranty that this is pure orange quinine wine. That however is not the ground of the decision of this Court in this case. The decision is that there was here no term in the contract of purchase that there should be a written warranty.

For those reasons I think the justices came to the wrong conclusion in this case, and that the appeal ought to be allowed, and the case remitted to them to convict.

SALTER J. I agree, although not without some regret.

I think that in the invoice and the label on the wrapper covering the bottle, and even in the label alone, there is contained a guarantee or warranty given by the original vendors to the respondent to the effect that this quinine wine was the same in nature, substance, and quality as that demanded of him by the prosecutor.

In order that the respondent may rely upon s. 25 of the Act of 1875, he must, however, show not only that he obtained a warranty that the article was of that nature, substance,

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and quality, but that "he had purchased the article with a written warranty to that effect." I agree that the authorities show that these words are not complied with unless the written warranty formed part of the contract either by being put into writing when the contract was made, or else by being put into writing afterwards in pursuance of a stipulation in the contract to that effect. In the present case the respondent has not shown that the warranty formed part of the contract under which he purchased the article. If it had been shown that there had for some time been relations between the respondent and his vendors, and that it had been agreed between them that each bottle should be enclosed in a wrapper containing the written warranty, it might well have been suggested that this wine was delivered with the usual wrapper, but there is no evidence to show that the respondent had ever dealt with the vendors before.

Appeal allowed. Case remitted with a direction to convict.

Solicitors for appellant : *Sharpe, Pritchard & Co.*

Solicitors for respondent : *Neve, Beck & Kirby.*

J. R.

[IN THE COURT OF APPEAL.]

In re GOOCH.*Ex parte* JUDD.

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Bankruptcy—Receiving Order—Petitioning Creditor's Debt—Bill of Exchange—Name of Indorser signed above Name of Drawer—Irregular Bill—Indorsement by way of Security—Right of Drawer to sue Indorser—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 20, s. 55, sub-s. 2 (c).

J. sold certain goods to C., Ltd., of which G. was managing director and in which he was largely interested. In payment for these goods J. drew a bill of exchange to his own order at three months for 450*l.* upon C., Ltd., who accepted it, and it was indorsed by G. before J. had indorsed it as payee, and his name appeared below that of G. The bill was indorsed by G. in order to enable J. to discount it, and for no consideration moving from J. to G., who was to be under no liability to J. The bill was discounted by J.'s bank and was not met at maturity. An arrangement was subsequently made by which C., Ltd., paid 100*l.* in cash to the bank in part satisfaction, and the bank received two bills drawn by J. to his own order and accepted by C., Ltd., for 175*l.* each at one month and two months respectively. These bills were indorsed by G. before they were signed by J. either as drawer or payee. They were afterwards indorsed by J., whose name appeared on the bills below that of G. The first bill not having been met at maturity, J. took it up and sued C., Ltd., and G. upon the bill and recovered judgment, and afterwards presented a petition in bankruptcy in the county court against G., founded on the judgment debt upon which a receiving order was made against him. On appeal:—

Held, that J. had authority under s. 20 of the Bills of Exchange Act, 1882, to fill in his own name as drawer and payee.

Held, also, that there was sufficient consideration passing from J. to G. to entitle J. to sue G. on the bill notwithstanding the order in which the signatures appeared on the bill.

Held, further, that by reason of the agreement between J. and G., G. could not, according to the authority of *Wilkinson v. Unwin* (1881) 7 Q. B. D. 636 have set up any defence against J. arising out of his own prior indorsement.

Held, therefore, that the judgment debt was a good petitioning creditor's debt and the receiving order was rightly made.

Glenie v. Smith [1908] 1 K. B. 263 followed.

Shaw v. Holland [1913] 2 K. B. 15 and *Jenkins & Sons v. Coomber* [1898] 2 Q. B. 168 distinguished.

Decision of Divisional Court affirmed.

APPEAL from an order of the Divisional Court (Horridge and Roche JJ.).

On May 17, 1920, Frederick Edgar Judd, who carried on

C. A. business under the name of F. E. Judd & Co., recovered
1921 judgment under Order XIV. in an action in the King's Bench
Division against Cardbox, Ltd., and Frederick Charles Gooch
GOOCH, for the amount on a bill of exchange for 175*l.*, dated
In re. February 24, 1920, drawn by Judd to his own order, accepted
JUDD, by Cardbox, Ltd., and indorsed by Gooch, payable one month
Ex parte. after date, and 10*l.* 11*s.* costs. Gooch's indorsement appeared
on the back of the bill above that of Judd as drawer and
payee.

Gooch having failed to pay the judgment debt, Judd presented a bankruptcy petition against him in the Chelmsford County Court. On the petition coming on for hearing before the registrar an objection was taken on behalf of Gooch that the judgment did not constitute a good petitioning creditor's debt. The registrar took the view that in the circumstances he was entitled to go behind the judgment. He accordingly investigated the matter and came to the conclusion that the judgment debt was a good petitioning creditor's debt. He therefore made the receiving order asked for.

The following statement of the history of the bill is taken from the written judgment of Warrington L.J.: " Cardbox, Ltd., was a company of which the debtor was managing director, and in which he was a large shareholder. In November, 1919, the company bought from Judd certain goods to the value of 450*l.*, and gave therefor a bill for that amount drawn by Judd to his own order upon and accepted by the company. After the delivery of the goods and the receipt of the accepted bill Judd desired to discount it with his bankers, but they, having discovered that the assets of the company were covered by debentures, refused to discount it unless it was indorsed by the debtor. On this being communicated to the debtor, he consented to indorse and did indorse the bill. At this time the drawer had not indorsed the bill as payee, but he afterwards did so, writing his name below that of the debtor. It has been held that as between him and Judd there was no consideration for his indorsement, and the correctness of this view has not been disputed before us. The liability of the debtor on this transaction,

treating the bill as a valid bill, would then be that of a surety for the company as acceptor and for Judd as drawer, and he would have been entitled had he paid the bank to recover from the company or from Judd. He would be under no liability to Judd.

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"The bill fell due and was not paid. It was thereupon agreed that the bank should renew the bill on being paid by the company 100*l.* in cash and being given two bills for 175*l.* each drawn by Judd to his own order upon and accepted by the company and indorsed by the debtor.

"The agreement was carried out as follows : 100*l.* was paid to the bank by cheque of the company, and there were handed to the bank two documents in the form of bills of exchange for 175*l.* each at one month and two months respectively. It is the first of these on which the petitioning creditor founds his claim. It purported to be drawn to the order of the drawer upon and is accepted by the company, and it bore on its back the signature of the debtor. The bank manager says it was brought to him 'for Judd to draw.' Subsequently Judd signed it as drawer and indorsed it as payee, but in doing so wrote his name on the back below that of the debtor.

"The bill remained in the possession of the bank until maturity ; it was then dishonoured by the company ; it was taken up by Judd as drawer and remains in his possession."

On an appeal by Gooch from the receiving order made by the registrar the Divisional Court affirmed his order.

Gooch appealed. The appeal was heard on December 17, 20, 1920.

Clayton K.C. and *P. B. Morle* for the appellant. The only question on this appeal is whether there was a good debt to support the petitioning creditor's petition. That depends on whether Gooch was under any liability to Judd on the bill in question. The registrar has found as a fact and the Divisional Court have accepted it, that Gooch indorsed the bill for 450*l.* in order to enable Judd to discount it, and for no consideration moving from him to Judd in respect of it. The two bills for

C. A. 175*l.* were given for the same purpose, and the Registrar was wrong in finding that there was any consideration for

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Gooch's indorsement which would make Gooch liable to Judd. These two bills were in exactly the same position as regards liability between Gooch and Judd as the bill for 450*l.* The bill when handed to Judd was not wanting in any material particular, and Judd had therefore no authority so to fill it up as to make Gooch liable to Judd upon it : Bills of Exchange Act, 1882, s. 20, sub-s. 1. But if he had such authority he has not effected this result because he has signed his name below that of Gooch. The bill is therefore irregular, and Judd cannot sue Gooch upon it as an indorser under s. 56 of the Act for the reason that Judd was not a holder in due course, as the bill was not complete and regular on the face of it. Judd therefore has no remedy on the bill against Gooch nor outside it, for the contract outside the bill was one of suretyship and there was no memorandum to satisfy s. 4 of the Statute of Frauds : *Steele v. M'Kinlay* (1) ; *Jenkins & Sons v. Coomber* (2) ; *Shaw v. Holland*. (3) *Glenie v. Smith* (4) is distinguishable. In that case one of the two bills was regular, the other had the drawer's name below that of the indorser, but this latter bill was treated in the judgment of A. T. Lawrence J. as having been so signed by mistake and as requiring to be read as if the signature of the drawer were also that of the indorser. So read the bills in that case were within *Wilkinson v. Unwin*. (5) But in this case there was no mistake. The signatures were intended to be in the order in which they were and consequently *Glenie v. Smith* (4) does not apply.

Further *Wilkinson v. Unwin* (5) has no application. That case established that although where the drawer as holder sues the indorser the indorser has the defence of circuity of action arising from the fact that the drawer is liable to the indorser by virtue of his, the drawer's, prior indorsement this defence is not available to the indorser if to give effect to

(1) (1880) 5 App. Cas. 754.

(2) [1898] 2 Q. B. 168.

(3) [1913] 2 K. B. 15.

(4) [1907] 2 K. B. 507 ; [1908] 1 K. B. 263.

(5) 7 Q. B. D. 636.

it would be contrary to the intention of the parties ; but the exception is limited to cases where the bill is a regular bill. And it assumes that the intention of the parties can be proved without infringing the Statute of Frauds.

Moreover there was no evidence of any such intention in this case. The evidence shows that the bill was indorsed by Gooch to accommodate Judd and not otherwise.

Hildesley for the respondent. It is conceded that the Court has jurisdiction to go behind a judgment to ascertain whether it was properly obtained or whether there was good consideration for the debt : *Ex parte Kibble* (1) ; but the jurisdiction should be exercised with caution : *Ex parte Lennox*. (2)

The bill was filled up in accordance with the authority given, as required by s. 20 of the Bills of Exchange Act, 1882. Gooch intended and agreed to become liable as an indorser and cannot now be heard to say that he has incurred no such liability : *Wilkinson v. Unwin*. (3) See also *Steele v. M'Kinlay*. (4) The bill passed from the hands of the petitioning creditor for value, and the case falls within s. 55, sub-s. 2 (c), of the Act. In *Glenie v. Smith* (5) one of the bills was indorsed in precisely the same manner as the bill in the present case, but no distinction was drawn between them by A. T. Lawrence J. or by the Court of Appeal. *Jenkins & Sons v. Coomber* (6) and *Shaw v. Holland* (7) are distinguishable, as in those cases the bills were not negotiated : see per Vaughan Williams L.J. in *Shaw v. Holland*. (8)

E. W. Hansell for the Official Receiver.

Clayton K.C. in reply. None of the statutory estoppels against indorsers apply in this case. The indorser is not denying any matter he is precluded from denying under s. 55, sub-s. 2, of the Act.

The fact of the bill having been negotiated to the Bank and after dishonour negotiated back to Judd by

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(1) (1875) L. R. 10 Ch. 373.

(5) [1907] 2 K. B. 507 ; [1908]

(2) (1885) 16 Q. B. D. 315.

1 K. B. 263.

(3) 7 Q. B. D. 636.

(6) [1898] 2 Q. B. 168.

(4) 5 App. Cas. 754.

(7) [1913] 2 K. B. 15.

(8) *Ibid.* 27.

C. A. the Bank makes no difference, for Judd deriving title from
1920 the Bank would have only the rights the Bank would have
GOOCH, had against parties prior to the Bank. These parties would
In re. include himself and Gooch. If the Bank as holder had sued
JUDD, Gooch as indorser Gooch could have sued Judd as drawer.
Ex parte. The position is therefore unaffected by any negotiation of
the bill.

Cur. adv. vult.

Feb. 15, 1921. The following written judgments were delivered :

LORD STERNDALÉ M.R. This appeal from the decision of a Divisional Court raises a difficult question as to the law of bills of exchange. The judgment of the Divisional Court treats the matter as a question of fact, and the point argued before us is not mentioned in it. We were told that the point was taken, but it cannot, I think, have been much insisted on ; but, however that may be, we have not the advantage of knowing the opinion of the learned judges on the point.

The petition was founded on a judgment debt, but the registrar held that in the circumstances he ought to go behind the judgment and inquire whether there was, apart from it, a good petitioning creditor's debt, and it is not disputed before us that this course was correct.

The facts of the case were as follows : The debtor was largely interested in, and the managing director of, a company called Cardbox, Ltd., and the petitioning creditor in November, 1919, supplied goods to the company for which he received a bill accepted by the company for 450*l.* His bank refused to discount this bill because the company's assets were covered by a debenture, and he obtained the indorsement of the debtor. The bank then discounted the bill, which was dishonoured at maturity. The registrar held that in fact there was no consideration for the indorsement as between the petitioning creditor and the debtor. I accept this finding without expressing any opinion as to whether it was correct or not.

The bill was not met at maturity because the debtor wished

to raise a defence and counterclaim against the petitioning creditor. This however was no defence against the bank, who insisted on payment.

An agreement was then made which is thus described by the bank manager. "The said Mr. Wild (who acted as solicitor both for Cardbox, Ltd., and for Gooch) called again a few days later and asked whether the bank would accept 100*l.* and renew for balance by two bills at one and two months respectively for 175*l.* each, which bills would be by same parties as the 450*l.* bill. I said I must refer to my customers and he left. I telephoned Judd & Co. and told Mr. Judd the proposal, and he said he would accept it, but must have the name of Gooch on the back of the two bills and his firm must not be charged with any expenses. I telephoned Mr. Wild that the bank and Judd would accept the offer made on condition that Mr. Gooch must personally indorse the bills and that all charges, i.e., accrued interest on the unpaid bill and charges for discounting the new bills, must be paid by his clients. On February 27 Mr. Wild brought me a cheque of Cardbox, Ltd., on Lloyds Bank for 100*l.* and the two new bills of 175*l.* each accepted by Cardbox, Ltd., and indorsed by Gooch for F. E. Judd & Co. to draw, and gave me his own cheque for accrued interest and discount charges of the new bills." It was, of course, important for the debtor to avoid proceedings against the company which would have followed either by the bank or by the petitioning creditor if he took up the bill. It has been held by the registrar and by the Divisional Court that there was an agreement by the debtor that he should be liable on the bill, and that there was consideration moving from the petitioning creditor which would support that agreement. I agree with that finding. It is upon one of these bills for 175*l.* that the petitioning creditor founds his claim.

When taken to the bank it was not a complete bill, but purported to be drawn upon and accepted by the company, and the debtor's name was written on the back as indorser. It was so brought by the solicitor acting for the debtor and the company, as the bank manager says, for the petitioning

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C. A. creditor to draw. He filled in his name as drawer and also
 1921 indorsed it as payee, but unfortunately he signed his name
 below instead of above that of the debtor. When the bill
 GOOCH, became due it was presented to the company as acceptors
In re. and dishonoured. The bank debited the petitioning creditor's
 JUDD, account and returned the bill to him. He then made a claim
Ex parte. upon the debtor and obtained the judgment, and the question
 Lord Sterndale is whether he has a good claim. But for the unfortunate
 M.R. misplacing of his name I think there would be no doubt about
 the petitioning creditor having a good claim, and I cannot
 see any merits in the debtor's defence; but the question of
 law is a difficult one.

I think that in the circumstances the petitioning creditor had authority under the Bills of Exchange Act, 1882, s. 20, to fill in his name as drawer and as payee, and by reason of the agreement between him and the debtor the latter could not according to the authority of *Wilkinson v. Unwin* (1) have set up any defence against him arising out of circuity of action by reason of the fact that he was drawer.

The difficulty arises from the mistake made by the petitioning creditor in signing his name as payee and indorser below instead of above that of the debtor, and it was argued that for that reason this bill was irregular and could not be sued upon.

The same state of things existed in one of the bills sued upon in *Glenie v. Smith*. (2) A. T. Lawrence J. in dealing with it said: "I think the bill for 124*l.* 11*s.* must be read with the other as though indorsed to the defendant by the drawer and re-indorsed by the defendant to the deceased for value received in the shape of pigs sold to the former pursuant to his request." In the Court of Appeal (3) the judgment of A. T. Lawrence J. was affirmed and no distinction was made between the bills, and therefore, I think, it must be taken that the whole of his judgment was approved.

The debtor, however, relied very strongly upon *Shaw v. Holland* (4) before Hamilton J. and the Court of Appeal,

(1) 7 Q. B. D. 636.

(2) [1907] 2 K. B. 507, 512.

(3) [1908] 1 K. B. 263.

(4) [1913] 2 K. B. 15.

where it was held that a bill indorsed as in the present case by the drawer below the name of the person sought to be made liable was not a regular bill and could not be sued upon by the drawer.

There are, however, points of distinction between that case and the present. In the first place no agreement by the indorser to be liable on the bill was found to exist, nor was there found any agreement by which the drawer was authorized to fill up the bill such as exists here. Again in that case the bill had not been negotiated. In this case it was negotiated to the bank, and I do not think that the petitioning creditor as against the bank could have set up a defence that there was no order by him to pay and that the bill was therefore irregular. Then when the bill came to maturity it was met by the petitioning creditor and handed to him by the bank. He then held the bill thus negotiated to him by the bank with the debtor's indorsement in blank upon it, and became a subsequent indorsee to the debtor. Judging by what was said by Vaughan Williams L.J. in *Shaw v. Holland* (1) he would have decided the case differently if the bill had been negotiated, and would have considered it as a case of indorsements being in wrong order.

I think for these reasons that the present case is distinguishable from *Shaw v. Holland* (2) and is within the authority of *Glenie v. Smith* (3), and that the petitioning creditor had a good claim upon the bill.

If the petitioning creditor became when the bill was handed to him by the bank after the payment a subsequent indorsee to the debtor, the latter is, by the Bills of Exchange Act, 1882, s. 55, sub-s. 2 (c), estopped from denying as against him that the bill is a valid subsisting bill and that he had a good title thereto.

I think the appeal should be dismissed with costs.

WARRINGTON L.J. This is an appeal from an order of the Divisional Court dismissing an appeal from a receiving order

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(1) [1913] 2 K. B. 15, 27.

(2) *Ibid.* 15.

(3) [1908] 1 K. B. 263.

C. A. made by the registrar of the Essex County Court sitting at
1921 Chelmsford.

GOOCH, The question is whether there was a valid debt due and
In re. owing to the petitioning creditor.

JUDD, The petition was founded on a judgment recovered in an
Ex parte. action by the petitioning creditor against the debtor on a
Warrington L.J. bill of exchange, but it is conceded that the judgment is not
conclusive, and that the Court is at liberty to go behind it,
and the case has proceeded on that footing.

The bill in question is dated February 24, 1920, for 175*l.*,
and, as it now stands, purports to be drawn by Judd, the
petitioning creditor, to his own order upon and accepted
by a company called Cardbox, *Ld.*, and indorsed by the
debtor. It also bears Judd's indorsement as payee, but his
name is written after that of the debtor.

The history of the bill is as follows. [His Lordship stated
the history of the bill as above set out and continued:] I agree
with the registrar and the Divisional Court that there was
consideration moving from Judd sufficient to support the
agreement under which the debtor indorsed this bill. The
latter was deeply interested in the company, and I think there
is enough to support the view that he joined in the transaction
by giving his name on the back of the new bills in consideration
of the abstention by Judd from taking up the bill for 450*l.*
and making it the foundation of an action against the company
or of proceedings in winding up.

I confess to having felt great doubt as to the true nature
of the agreement as between the debtor and Judd to be inferred
from the facts, but I am now satisfied that the views expressed
by the other members of the Court are correct, and that the
debtor must be held to have agreed with Judd to be liable to
him on the bill should he become the holder of it, and, but
for the unfortunate fact that Judd wrote his name as payee
in the wrong place, the debtor would have had no defence:
see *Wilkinson v. Unwin*. (1)

If this is the true view, then I think the case falls within
the decision in *Glenie v. Smith* (2) rather than within that of

(1) 7 Q. B. D. 636.

(2) [1907] 2 K. B. 507; [1908] 1 K. B. 263.

Shaw v. Holland. (1) Moreover, I think the bill was negotiated to the bank and was afterwards taken up by Judd on its not being met at maturity, and it seems that if these facts had been present in *Shaw v. Holland* (1) the judgment of Vaughan Williams L.J. in that case would have been in favour of the appellants.

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Warrington L.J.

On the whole then I agree that this appeal must be dismissed.

SCRUTTON L.J. One F. E. Judd attempted to make a debtor bankrupt for non-payment of a judgment debt. The county court registrar held quite correctly that he was at liberty to go behind the judgment, and see whether there was a good debt to support it. He held that there was, and the Divisional Court affirmed his decision. The debtor now appeals to us, and the appeal raises a difficult question of mercantile law. The debtor has no commercial merits; from a business point of view he ought to pay, and from a business point of view that he should even take the point which raises the difficulty is very unmeritorious. But he has a right to the point, if it is legally good, and the relevant decisions of the Court of Appeal make the decision whether the point is a good one a difficult one to arrive at. There are strong grounds for saying that the judge and Court of Appeal who decided *Glenie v. Smith* (2) would have decided against him; there are some grounds for saying that the judge and Court of Appeal who decided *Shaw v. Holland* (1) would have decided in his favour. The facts are as follows: The debtor was the managing director and a very large shareholder in Cardbox, Ltd. His company had bought some goods for cash from Judd, and were about to buy some more for 450*l*. There was some difference of opinion on the terms of payment, and some dispute of evidence whether the property in the goods had passed. It is however clear that Cardbox, Ltd., accepted a bill drawn by Judd for 450*l*., and that Judd tried to discount it with their bank, who refused because Cardbox, Ltd., had issued debentures in favour of their bank over all their assets. It is clear that after that Judd brought the bill

(1) [1913] 2 K. B. 15. (2) [1907] 2 K. B. 507; [1908] 1 K. B. 263.

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back to the debtor, who wrote his name on the back, and the bank then discounted it. The registrar found that there was no consideration between Judd and the debtor for the indorsement. The Divisional Court doubt this, but assume it. I have similar doubts, but as this is not the bill in question in this case, I also assume it.

This bill for 450*l.* came due and Cardbox, *Ld.*, were not able to pay it, but wanted it renewed. What happened is stated in the bank manager's affidavit. [His Lordship read the passages referred to by the Master of the Rolls.] It will be seen that the bank and Judd accepted a proposal from Cardbox, *Ld.*, and the debtor; that the debtor clearly intended to make himself liable on the bill, and intended and authorized Judd and the bank to do what was necessary to make the incomplete bills complete. What happened next was that the bank got Judd to insert his name as drawer and to indorse the bills, but unfortunately Judd's indorsement was put below and not above the debtor's indorsement. When the second bill became due it was presented by the bank as holders to Cardbox, *Ld.*, and dishonoured. The bank then debited Judd's account with the money, as drawer and indorser, and returned him the bill. Judd as holder then claimed on the debtor. The question is whether he had a good legal claim.

If Judd had written his name before instead of after the debtor's there would, I think, have been no difficulty. Sect. 20 of the Bills of Exchange Act would have given the person in possession of the bill *prima facie* authority to fill up the omission of any material particular in any way he thought fit, and as the debtor had clearly intended to make himself liable to Judd and the bank in a complete bill he could not have disproved the authority. The bill was wanting in the drawer's name, and in the order of the payee to pay, and Judd might have filled both of these in. This view appears to be justified by *Glenie v. Smith*. (1)

Further it would not be possible when Judd as holder and subsequent indorsee sued the debtor as prior indorser, for the debtor to set up as a defence that Judd was also drawer, and

(1) [1908] 1 K. B. 263.

that therefore if he paid Judd as subsequent indorsee he could in turn sue Judd as drawer and prior indorser.

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Wilkinson v. Unwin (1) and the earlier cases cited in the judgments therein show that where the relations between the prior parties are such that the second could not sue the first, the fact that the third party is also the first is no answer for the second party, when sued by the third.

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The trouble arises from the fact that Judd did not write his name as an order to pay before the debtor's name, but after it.

On this the position of the authorities is peculiar. In *Glenie v. Smith* (2) one of the two bills had the same defect. A. T. Lawrence J. dealt with it in his judgment apparently by treating the indorsement of the drawer as equivalent to a prior order to pay. The Court of Appeal, though the point, being mentioned in the judgment of the judge below, must have been before them, do not treat it as making any difference in the drawer's claim. In this case, as the signatures alone were on the bill when handed to the intended drawer, s. 20 was clearly applicable. In *Shaw v. Holland* (3), however, the bill was drawn and accepted before the two indorsers put their names on the back; but when they did so, the drawer had not put his indorsement on the back, by way of order to pay. Hamilton J. held that *Jenkins & Sons v. Coomber* (4), where the facts were similar, was recognized as good law in *Glenie v. Smith* (5), because s. 20 of the Bills of Exchange Act did not apply to *Jenkins & Sons v. Coomber*. (4) The reason why it did not apply was that any authority to complete by inserting the missing order to pay had not been complied with. The Court of Appeal adopted the reasons of Hamilton J. If this cannot be distinguished, the Court of Appeal in *Glenie v. Smith* (5) ought to have decided the case of the second bill the opposite way to that in which they did decide it. And just as the first Court of Appeal said nothing about the point, the second Court of Appeal said nothing about the contrary decision in *Glenie v. Smith* (5), though the point was argued

(1) 7 Q. B. D. 636.

(3) [1913] 2 K. B. 15.

(2) [1907] 2 K. B. 507, 512.

(4) [1898] 2 Q. B. 168.

(5) [1908] 1 K. B. 263.

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before them. What differences are there between the present case and *Shaw v. Holland* (1)? In the first place Hamilton J. declines to find any agreement by the indorsers that the drawers shall add anything necessary to make the bill a regular and complete bill of exchange on which the indorsers might be sued as indorsers. I think it is clear that such an agreement should be implied in this case. Lord Watson in *Steele v. M'Kinlay* (2) says: "No doubt a proper indorsement can only be made by one who has a right to the bill" (and here the debtor having no order to pay from the drawer had no right to the bill). "But it is perfectly consistent with the principles of the law merchant that a person who writes an indorsement with intent to become a party to a bill, shall be held—withstanding he has not and therefore cannot give any right to its contents—to be subject, as in a question with subsequent holders, to all the liabilities of a proper indorser."

Secondly, the bill in *Shaw v. Holland* (3) was not negotiated, as Vaughan Williams L.J. points out. "This is not a case of a bill in which indorsements appear to be simply in wrong order; it is a case in which the bill was never negotiated." Negotiation (s. 31, sub-s. 1) is transference from one person to another in such a manner as to constitute the transferee the holder of the bill. It seems to be clear that when Judd filled in the name of the drawer and put his name on the back of the bill he negotiated it to the bank, and in a claim by the bank on him on the bill could not have replied the bank had no complete bill, for there was no order to pay, as the bank negotiated the bill back to Judd when he paid them their claim. Judd as a subsequent indorsee, i.e., holding under the debtor's indorsement in blank and in that capacity sues his prior indorser. If there had been negotiation in *Shaw v. Holland* (4) apparently Vaughan Williams L.J. would have dealt with the wrong order of the indorsements in the same way as A. T. Lawrence J. did in *Glenie v. Smith*. (5) At

(1) [1913] 2 K. B. 15, 18.

(2) 5 App. Cas. 754, 782.

(3) [1913] 2 K. B. 15, 27.

(4) *Ibid.* 15.

(5) [1907] 2 K. B. 507.

any rate s. 31, sub-s. 4, of the Act would give the bank the same title as the drawer, and the right to have the indorsement of the transferor.

Further, by s. 55, sub-s. 2 (c), of the Act the indorser of a bill by indorsing it is precluded from denying to a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto. Now the debtor intended to be an indorser, giving authority to his drawer to fill up the bill as a regular bill. I think the statute estops him from denying to his subsequent indorsee, Judd, who holds because of the debtor's indorsement in blank (not, it is to be noted, to "a holder in due course" as in s. 56), that the bill when he indorsed it was a valid and subsisting bill.

With these points of difference, and sections of the Act not considered, I think I am at liberty to exercise my own judgment between the contradictory decisions of *Glenie v. Smith* (1) and *Shaw v. Holland*. (2) Now in my view the debtor clearly intended and contracted to make himself liable as indorser for good consideration moving from Judd. He did so not merely as surety for Cardbox, Ltd., but as a person interested in that company, giving consideration for time given to that company and himself as a person interested in it. Judd's signature, which would make the debtor liable as indorser, is on the bill, though in the wrong place, and I think there is every reason to enforce the statutory estoppel against the debtor denying to Judd, a subsequent indorsee, that it was a good bill which he indorsed to him. For that is what the debtor wants to say—namely, that the bill he indorsed was a bad bill at the time he indorsed it and obtained time to pay by so doing.

The judges below arrive at the same result by applying the doctrine of *Wilkinson v. Unwin* (3) to the case and do not expressly deal with the point as to the order of the indorsements, it may be because it was not argued before them so clearly or forcibly as it was argued before us.

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(1) [1908] 1 K. B. 263.

(2) [1913] 2 K. B. 15.

(3) 7 Q. B. D. 636.

C. A. While the case is a difficult one by reason of the decisions,
 1921 there is no business difficulty in it. The debtor to get time
 by his solicitor presents an incomplete bill, and takes advantage
 of a possible error in filling it up to attempt to escape from
 liability for a sum for which he clearly intended to make
 himself liable, and which from a business point of view he
 ought to pay. I am pleased to decide the point against him.
 The appeal should be dismissed with costs.

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Appeal dismissed.

Solicitor for appellant : *A. F. V. Wild.*

Solicitor for respondent : *F. H. Munby.*

Solicitor for Official Receiver : *Solicitor to the Board of Trade.*

W. I. C.

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[IN THE COURT OF APPEAL.]

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March 3.

VERSCHURES CREAMERIES, LIMITED *v.* HULL AND
 NETHERLANDS STEAMSHIP COMPANY, LIMITED.

[1919. V. 171.]

*Waiver of Tort—Alternative Remedies—Election—Judgment for Goods sold
 and delivered—Forwarding Agent—Negligence.*

Goods were delivered by the owners to forwarding agents to be carried by sea to Hull and thence forwarded to a customer in Manchester. When the goods arrived at Hull the owners instructed the forwarding agents not to deliver to the customer, but the goods were nevertheless delivered to him. The owners thereupon invoiced the goods to the customer and sued him and recovered judgment for the price of goods sold and delivered, and then, failing to get satisfaction, took proceedings in bankruptcy against him:—

Held, that they could not afterwards sue the forwarding agents for negligence and breach of duty.

Judgment of Bailhache J. affirmed.

APPEAL from the judgment of Bailhache J. in an action tried before the learned judge without a jury.

On March 23, 1917, the defendants, who were carriers and forwarding agents, accepted from the plaintiffs in Rotterdam

certain cases and boxes of margarine to be carried to Hull and to be forwarded from thence as the plaintiffs should direct. The goods had been originally consigned partly to one R. Beilin in Manchester and partly to one S. Beilin in Liverpool; but on or before their arrival at Hull the plaintiffs directed the defendants not to deliver them to R. Beilin or S. Beilin, but to deliver some of them—namely, 30 cases and 50 boxes—to one Schneiderman of Manchester. The defendants acknowledged and accepted the direction, but notwithstanding this these goods were in fact delivered to R. Beilin in Manchester. A further parcel of 30 boxes was also delivered to the said R. Beilin without instructions from the plaintiffs.

On April 25, 1917, the plaintiffs having heard of the mis-delivery wrote to the defendants: "We had good reasons for not wishing these goods to come into the possession of Mr. Beilin. We have accordingly invoiced the goods that Mr. Beilin received, but we hereby advise you that we must look to you to indemnify us should we fail to obtain payment from Mr. Beilin for the goods delivered to him contrary to our instructions." The plaintiffs then brought an action against Beilin, and on June 28, 1917, they wrote to the defendants: "We have instituted proceedings against Mr. Beilin for the amount due to us . . . which however does not relieve you of your responsibility to us in respect of our claim until we have secured payment for the moneys due to us. We shall, however, keep you informed as to the course of the proceedings we have instituted against Mr. Beilin." On April 9 the plaintiffs wrote to inform the defendants that they had got judgment against Beilin "for the moneys owing to us in respect of margarine supplied to him"; but that they had failed to obtain payment and had instituted bankruptcy proceedings against him.

The plaintiffs then brought the present action against the defendants for negligence and breach of duty as carriers or forwarding agents. The defendants pleaded that after the delivery to Beilin and with knowledge thereof the plaintiffs elected to invoice all the goods mentioned in the statement

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C. A. of claim to Beilin and to debit him therewith and subsequently
 1921 to sue him in the King's Bench Division for the price thereof,
 and that they obtained judgment against him on January 18,
 1918, and afterwards instituted bankruptcy proceedings
 against him in respect of the judgment debt. The defendants
 contended that the plaintiffs were concluded by this election
 and precluded from bringing the present action.

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Bailhache J. acceded to this contention and gave judgment for the defendants.

The plaintiffs appealed.

Schiller K.C. and *W. Addington Willis* for the appellants. The appellants are not precluded from bringing this action. The respondents were no parties to the action against Beilin or in any way bound by the judgment or subsequent proceedings against him. The appellants expressly reserved their remedies against the respondents. Beilin has committed a wrong in converting the appellants' goods to his own use. The respondents have committed another wrong in delivering the goods to Beilin contrary to the appellants' instructions. Why should not both be sued? The mere fact of having sued Beilin for goods sold and delivered instead of for money had and received, when both forms of action were available, should not preclude the appellants from recovering the value of their goods lost through the respondents' negligence. If the appellants had recovered the full invoice price of the goods from Beilin they probably could not have recovered anything more in an action against the respondents. But having recovered nothing from Beilin, they should now be allowed to sue the respondents for their breach of duty as forwarding agents.

Le Quesne for the respondents was not called on.

BANKES L.J. This is an attempt to blow hot and cold, as Lord Esher used to say (1), or to approbate and reprobate, in the language of others. A quantity of margarine belonging to the appellants was dispatched from Holland on board the respondents' vessel consigned to one Beilin in Manchester.

(1) Following Lord Kenyon C.J. 217; 2 Sm. L. C., 12th ed., 139, 145. in *Smith v. Hodson* (1791) 4 T. R. 211,

For some good reason the appellants desired that this margarine should not reach Beilin, so they instructed the respondents, who were acting as carriers of the goods, to hold them at Hull and await further orders. The respondents acknowledged and accepted this order, but nevertheless they delivered the goods to Beilin. When the appellants discovered this they had a right to elect; they might refuse to recognize the action of the respondents in delivering the goods to Beilin and sue them for conversion or breach of duty, or they might recognize and adopt the act of the respondents and sue Beilin for goods sold and delivered. They elected to take the latter course, and they sued Beilin to judgment. Having elected to treat the delivery to him as an authorized delivery they cannot treat the same act as a misdelivery. To do so would be to approbate and reprobate the same act. The judgment of Bailhache J. was right and this appeal must be dismissed.

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SCRUTTON L.J. I am of the same opinion. Certain goods were delivered to a wrong consignee. The owners of the goods might have sued for conversion. They did not do this. They "assumpsit bring and, godlike, waive the tort." (1) They did not sue for the value of the goods; they sued for the contract price alleging a contract to sell and a right delivery under it, and they recovered judgment on that basis. Now they propose to turn round and sue their agents on the basis of a misdelivery; and Mr. Schiller argues that they can do this. It is not easy to see why this act of the owners should enure to the benefit of the agents, who were no parties to the action for goods sold and delivered, and who have in no way altered their position in consequence of any election involved in bringing that action, but the principle is well established. A plaintiff is not permitted to "approbate and

(1) "Thoughts much too deep for
tears pervade the Court,
When I assumpsit bring and,
godlike, waive the tort."

The lines are from "The Circuit-
eers, An Eclogue," by An Inner

Templar (John Leycester Adolphus,
the reporter). See Notes and
Queries, 3rd Ser., vol. v., p. 6. Jan. 2,
1864. Another version will be found
in the Law Quarterly Review, vol. i.,
p. 232. *Holsworth v. Holsworth* 1871

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reprobate." The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election—namely, that no party can accept and reject the same instrument: *Ker v. Wauchope* (1); *Douglas-Menzies v. Umphelby*. (2) The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

ATKIN L.J. I agree. Forwarding agents were instructed to deliver goods to one consignee. They delivered the goods to another. That person had been in contractual relation with the owners of the goods; he had been their buying agent; he was the only person to whom they sent their goods in Manchester or Liverpool, and there was a course of dealing by which the goods were delivered to him at a particular price. When these goods came to his hands, as other goods had come, he treated them as having come in the ordinary course of dealing, and he sold them to his customers. The owners treated the goods as having rightly come to his hands; they sued him for the price of them, recovered judgment against him, and made him a bankrupt. Thereby they affirmed and ratified the act of the forwarding agents. Having done that they cannot afterwards sue the agents as having acted in breach of their mandate. Their attempted reservation of rights against the agents was ineffective. They were renouncing by their act the rights they were professing to reserve. I agree therefore that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Woodham Smith & Borradaile.*

Solicitors for respondents: *Botterell & Roche, for Hearfields & Lambert, Hull.*

(1) (1819) 1 Bli. 1, 21.

(2) [1908] A. C. 224, 232.

[IN THE COURT OF APPEAL.]

LIMERICK STEAMSHIP COMPANY, LIMITED v.
W. H. STOTT AND COMPANY, LIMITED.

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April 11, 12,
22.

[1920. L. 737.]

Shipping—Charterparty—Ice-bound Port—Ship not to be obliged to force Ice.

A steamer was chartered for a Baltic round voyage in winter. The charterparty contained the following clause: "The steamer shall not be ordered to any port where fever or pestilence is present, or any port blockaded, or where hostilities are being carried on, or any ice-bound port, or any port where lights or lightships are or are about to be withdrawn by reason of ice or war, or where there is risk that in the ordinary course of things the steamer will not be able on account of ice to enter the port or to get out after having completed loading or discharging, nor shall the steamer be obliged to force ice." . . .

The charterers ordered the steamer to Abo, a port in Finland, which is naturally icebound in winter but is kept open all the year by means of icebreakers employed for that purpose by the Government of Finland. On the voyage to Abo the steamer encountered ice. The captain tried to force his way through, but failed, and the steamer remained fast in the ice until released by an icebreaker from Stockholm. The captain then continued his voyage and reached Abo. There it was found that the steamer had been injured by contact with the ice.

The shipowners sued the charterers for breaches of the charterparty: (1.) in ordering the steamer to an ice-bound port; (2.) in ordering her to a port on her way to which she was obliged to force ice:—

Held, by Bankes, Scrutton and Atkin L.JJ., that Abo was not an ice-bound port within the meaning of the charterparty, and therefore that there had been no breach by the charterers as firstly alleged.

Held, by Bankes and Scrutton L.JJ., dubitante Atkin L.J., that on the true construction of the charterparty there had been no breach by the charterers as secondly alleged.

Judgment of Bailhache J. [1921] 1 K. B. 568 affirmed.

APPEAL from the judgment of Bailhache J. in an action tried before the learned judge without a jury. (1)

The plaintiffs, who were the owners of the steamship *Innisboffin*, brought the action to recover damages for breaches of a charterparty dated November 25, 1919, whereby they chartered their steamer to the defendants. The charterparty was for the most part in the form of the Baltic and White Sea Conference Uniform Time Charter, 1912, but the form was

(1) [1921] 1 K. B. 568.

C. A. slightly varied to adapt it to the circumstances. So varied
1921 it contained the following provisions :—

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By clause 1 the owners agreed to let and the charterers agreed to hire the steamer for one Baltic round voyage. The steamer was to be delivered and placed at the disposal of the charterers at Huelva and to be employed in lawful trades between good and safe ports or places within the limits of a Baltic round voyage where she could always safely lie afloat as the charterers or their agents should direct. By clause 2 the owners were to provide and pay for all the provisions, coal, and wages for galley, and for the insurance of the steamer, and for all deck and engine-room stores, and to maintain her in a thoroughly efficient state in hull and machinery for and during the voyage. By clause 3 the charterers were to provide and pay for all the coals, fuel, and water for boilers, port charges, pilotages, boatage, lights and tug assistance, consulages (with certain exceptions), canal and dock dues, agencies, commissions, expenses of loading, unloading and delivery of cargo and all other expenses. By clause 5 the charterers agreed to pay a monthly hire in advance by cash in London.

The charterparty also contained the following clauses :—

“ 7. The steamer shall be redelivered on the expiration of this charterparty in the same good order as when delivered to the charterers (fair wear and tear excepted) at an ice-free port in the charterers' option in the United Kingdom. . . .

“ 9. The captain shall prosecute his voyages with the utmost dispatch and shall render all customary assistance with the ship's crew. Although appointed by the owners the captain shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements ; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain or officers personally or by agents signing bills of lading or other documents or otherwise complying with such orders, as well as from any irregularity in the steamer's papers or for over carrying goods. . . .

“ 12. In the event of loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull

or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, the hire shall cease from the commencement of such loss of time until she be again in an efficient state to resume her service; but should the steamer be driven into port or to anchorage by stress of weather or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for the charterers' account."

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" 16. The steamer shall not be ordered to any port where fever or pestilence is prevalent, or any port blockaded, or where hostilities are being carried on, or any ice-bound port, or any port where lights or lightships are or are about to be withdrawn by reason of ice or war, or where there is risk that in the ordinary course of things the steamer will not be able on account of ice to enter the port or to get out after having completed loading or discharging, nor shall the steamer be obliged to force ice. Should the steamer be detained by any of the above causes such detention shall be for the charterers' account. Nevertheless if on account of ice the captain should consider it dangerous to remain at the port of loading for fear of the steamer being frozen in ^{and}/_{or} damaged he shall have liberty (but not be obliged) to sail to a convenient open place and await the charterers' fresh instructions."

The following statement of the facts is taken from the written judgment of Bankes L.J.: The vessel came on hire shortly after the date of the charterparty. In January, 1920, she was ordered by the defendants to proceed to Abo, a port on the coast of Finland. In proceeding on that voyage the master kept close to the east coast of Sweden, and when somewhere north of Stockholm he encountered ice. He endeavoured to force his way through, but failed and was obliged to wait until an icebreaker from Stockholm came to his assistance. Having been released by the icebreaker the master continued his voyage, and eventually arrived at Abo through the channel which is kept open to that port by

C. A. icebreakers employed for that purpose by the Government of
1921 Finland. The vessel sustained injury from contact with the
ice. In respect of that injury the action was brought. (1)

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The plaintiffs contended that Abo was an ice-bound port within the meaning of clause 16 of the charterparty and that the defendants committed a breach of that clause in ordering the vessel to that port, and were liable for the resulting damage ; they further contended that the steamer was obliged to force ice in order to reach Abo, and that for this reason also it was a breach of s. 16 to order the steamer to that port ; and thirdly, that even supposing the defendants were not guilty of any breach of the charterparty, clause 16 imposed upon them a liability for damage sustained by the ship in reaching the port.

Bailhache J. held (1.) that Abo was not an ice-bound port within the meaning of the charterparty ; (2.) that it was left to the master's discretion whether he should force ice or not, and that the plaintiffs could not recover for damage sustained if he elected to force ice. He therefore gave judgment for the defendants.

The plaintiffs appealed.

MacKinnon K.C. and *Claughton Scott* for the appellants. Abo was an ice-bound port within the meaning of clause 16 of the charterparty. Plainly the object of that clause was to save the appellants from detention of their ship as well as from damage to it. Fever, pestilence, blockade, and hostilities are as much to be avoided as ice. Therefore not only the entry to the port but the route to be taken is within the scope and intention of the clause. One of the misfortunes to be guarded against is substantial obstruction to the vessel. She was likely to encounter this if she proceeded to a port which, although partially opened by artificial means, is naturally icebound.

The words "nor shall the steamer be obliged to force ice" follow closely upon the earlier words of clause 16 limiting

(1) Another claim for damages that claim was not the subject of
was made in the Court below ; but an appeal.

the power of the respondents as charterers to order the ship to ports where she is likely to be damaged or detained. They mean that if it is necessary to force ice on a voyage to or from any port, the vessel shall not be ordered to that port. If the charterers order the master to proceed to such a port they commit a breach of the charterparty and are liable for damage incurred through obedience to their orders. The master has no choice. By clause 9 he is to prosecute his voyages with the utmost dispatch and to be under the orders and direction of the respondents. They assume liability for this when they undertake by clause 7 to restore the ship to the appellants as they found her.

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If the words in clause 16 mean no more than that the captain if ordered to force ice is not bound to obey, yet as he did force ice at the request of the respondents they are liable to indemnify the appellants for the damage to their vessel.

[BANKES L.J. The Court is of opinion that Abo is not an ice-bound port within the meaning of this charterparty.]

R. A. Wright K.C. and *Jowitt* for the respondents. The words in clause 16, "nor shall the steamer be obliged to force ice" are not merely a part of the preceding provision forbidding the charterers from ordering the ship to ice-bound ports; they form a distinct and separate stipulation of the charter, and mean that the captain if ordered to force ice may refuse. If he refuses he does not thereby make the shipowners liable for breach of the charter or prejudice their right to the monthly hire for the use of their ship; if he complies with the order he does so as the servant of the owners and not merely because it is the order of the charterers. Possession of the steamer remains in the owners and *prima facie* if the hull is injured the loss falls upon them. Consistently with this the owners, by clause 2 of the charterparty, provide for the insurance of the steamer and agree to maintain her in a thoroughly efficient state during the voyage. Clause 7 does not help them, because fair wear and tear are excepted. Clause 9 does not put the captain under the orders of the charterers as regards navigation. To give an order which need not be obeyed is not a breach of the charterparty.

C. A. *MacKinnon K.C.* in reply. The shipowners' agreement
 1921 to insure the ship does not relieve the charterers from liability
 LIMERICK for damage done to her: *Aira Force Steamship Co. v.*
 S.S. Co. *Christie*. (1)
 v.
 STOTT. [Elder, Dempster & Co. v. Dunn (2) was also cited.]

Cur. adv. vult.

April 22. The following written judgments were delivered :

BANKES L.J. In this action the plaintiffs as owners of the steamship *Innisboffin* claim damages from the defendants as charterers for injury sustained by the vessel as a result of her encountering ice on a voyage upon which she had been ordered by the defendants. As the case is presented to this Court by the appellants there is no dispute as to the facts. The question turns upon the construction of the charterparty. The material facts are as follows. [The Lord Justice having stated the facts as above and read clause 16 of the charterparty proceeded:] Bailhache J. has held that Abo was not an ice-bound port within the meaning of this clause, having regard to the fact that the Government of Finland kept a channel to the port open in spite of the ice. I agree with the learned judge's conclusion upon the facts of this case, though I think it undesirable to attempt to give a definition of what constitutes an ice-bound port which would be applicable under all circumstances.

The other point upon the construction of this clause is to my mind one of considerable difficulty. The appellants contend that the clause from its commencement down to the words "to force ice" should be read as one continuous sentence, the whole of which refers to limitations placed upon the powers of the charterers. Thus read, the words "nor shall the steamer be obliged to force ice" are a short form for expressing "nor shall the steamer be ordered to any port to arrive at which she will be obliged to force ice," or some equivalent words. On the other hand the respondents say that the words "nor shall the steamer be obliged to force ice"

(1) (1892) 9 Times L. R. 104.

(2) (1909) 15 Com. Cas. 49.

should be read as a separate sentence from what precedes them, and relate to the legal or contractual obligation on the part of the steamer, and not to any limitation upon the powers of the charterers. Bailhache J. has adopted the latter construction. I agree with his view. From any point of view the clause is not skilfully drafted. The use of the word "nor" appears to indicate that the draftsman intended the concluding words to form part of one continuous sentence. On the other hand if this view is adopted it necessitates the introduction of words which are not in the sentence as drafted; because the "shall" which follows the "nor" must refer to orders under which the steamer may or will be obliged to force ice, and some words attaching the "shall" to orders given by the charterers rather than to the obligation imposed on the steamer must be read with the concluding part of the sentence to give it the meaning contended for by the appellants. In my opinion less violence is done to the language actually used by adopting the construction contended for by the respondents than that contended for by the appellants, and it also seems to me that the respondents' construction fits in better with what I conceive to be the general intention of the parties as expressed in the charterparty as a whole than that of the appellants. Reference was made during the argument to clause 7, but I did not understand that the appellants desired to found any claim upon its provisions. I therefore express no opinion upon what is admitted to be a clause always introduced into this form of charterparty but never insisted upon. A point was made by Mr. Jowitt that even assuming the appellants' construction of clause 16 was accepted the respondents were entitled to succeed upon the facts, because the evidence proved that the master never was obliged to force ice. I express no opinion on this point, as the evidence was not gone into, and in my view of the meaning of clause 16 it is not necessary to consider it. If clause 16 is to be read as I think it should be read the appellants have failed to establish any breach of the contract contained in the charterparty for which a claim to damages could be made. I desire to reserve any opinion upon

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C. A. the question what damages are recoverable in the event of a
1921 breach of the provisions of clause 16 being proved. For the
LIMERICK reason I have given I think that this appeal fails and must be
S.S. Co. dismissed with costs.
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SCRUTTON L.J. The plaintiffs, the appellants, were owners of a ship which was chartered by the defendants, the respondents, in November, to go a Baltic round voyage. She was ordered in January to Abo in Finland, and in the course of the round voyage was damaged by ice. The ship-owners then sued the charterers alleging: (1.) that they had ordered her to an ice-bound port contrary to clause 16 of the charter, and that in consequence she was damaged; (2.) that they had ordered her to a port to enter which might oblige her to force ice, and that in consequence she was damaged. The first claim fails in fact. The judge below has found, and I agree with him, that Abo was not an ice-bound port. It would be if no artificial measures were taken, but in fact by the use of icebreakers a channel for entrance is kept open from the Aland Islands to Abo. The captain admitted it was kept open the whole year and the defendants' witnesses proved that steamers were running six voyages a week between Stockholm and Abo the whole winter. Such a port kept artificially open the whole winter cannot be said to be icebound.

On the second head the facts seem to be that the *Innisboffin*, a steamer 31 years old, met on her voyage through the Baltic on a proper route some thick ice some 200 miles from Abo; she tried to get through it by ramming it—i.e., to “force” it—but she failed and became fast in the ice. She then by wireless telegraphy summoned an icebreaker from Stockholm, which extricated her, and for the rest of the voyage she ran in channels made by icebreakers, or open sea. Shortly after this incident her forepeak was found leaking, and her plates were bent in, as appears in the photographs, between the frames. Clause 16 enables the captain to refuse to go to an ice-bound port, and to refuse to force ice which he meets on his voyage, without being guilty of any breach of charter, and without

prejudicing his owners' right to hire while he is waiting for proper orders, or for a sea free of ice. He is also allowed, but is not obliged, to leave a port which is likely to become ice-bound; that is, in my view, it cannot be said that the owner loses his right to hire, because the captain elects to stay when he might have escaped. Now whether or not the ship will meet thick ice on this Baltic round seems to be a matter of uncertainty. (What the master will do when he meets thick ice seems to be a matter of his navigation. The charterer does not give him any orders as to this situation or "oblige" him to do anything, and he will not prejudice his owners' hire by waiting till he can get through. He is not "obliged to force ice.") In this particular case by sending for the ice-breaker he could have got through without damaging himself. I am unable to see what breach of charter the charterers have committed in this case; the damage seems to have resulted from the captain's decision to take a course of action which by the charter he was relieved from the obligation to take. Some damage is supposed to have resulted from storms blowing the steamer on the thick ice at the edge of the icebreaker's channel. This does not seem to be the charterers' affair.)

The question was argued before us whether the charterers who requested the ship to go to an unsafe or an ice-bound port, to which she was not bound to go, were liable if she went for damage sustained on her voyage. I desire to reserve my opinion on this point. The state of knowledge of shipowner and charterer may be material when the point has to be decided. The action was not based on clause 7 of the charter. It is not clear what this clause means, as it is difficult to reconcile with the shipowners' obligation to maintain the ship efficient under clause 2 and to insure her under the same clause; and with the last part of clause 12. When it is necessary to construe the clause it will be desirable to consider what is covered by "fair wear and tear," and whether the clause applies to damage not caused in any way by the charterer.

In my view the appeal should be dismissed with costs.

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ATKIN L.J. I have found considerable difficulty in construing clause 16 of this charterparty. Unaided I think I should have come to the conclusion that the words "nor shall steamer be obliged to force ice" were intended to impose a restriction upon the charterers' rights to direct the ship to a particular port, a restriction additional to those imposed in the first words of the clause "that the steamer shall not be ordered to any port," etc. The words might reasonably mean "nor shall the steamer be ordered to a port to reach or leave which she finds herself compelled to force ice." It occurred to me that if she were ordered on a voyage in which she found herself shut in by ice, so that for safety she had to force herself through, the damage caused by this action of the ship would be for charterers' account; and I was inclined to think that the express provision for detention immediately following the words in question treated the obligation to force ice as one of the causes which expressly put detention on charterers' account. I should not have read the words as merely giving a liberty to the ship to abstain from forcing ice. Had I come to the conclusion above suggested I should have thought that there was evidence fit to be considered by the trial judge that in this case there had been a breach of contract by the charterers. I recognize however that this meaning of the word "obliged" is not the meaning of the same word three lines lower down in the same clause; and when I find my brother Bailhache and the two other members of the Court taking a different view I have not sufficient confidence in my opinion to say that the judgment appealed from is wrong. I agree that Abo was not in the circumstances an ice-bound port.

Appeal dismissed.

Solicitors for appellants : *W. A. Crump & Son.*

Solicitors for respondents : *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

W. H. G.

In re WHALEY AND ANOTHER.

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April 18, 25.

Ex parte THE OFFICIAL RECEIVER.

Bankruptcy—Committal—Disobedience by Bankrupt to Order to pay Part of Salary—Motion by Official Receiver to commit—Official Receiver acting as Trustee—Necessity for Affidavit—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 22, sub-ss. 2, 4—Bankruptcy Rules, 1915, rr. 83, 320.

An application to commit a bankrupt for contempt of Court made by the Official Receiver acting as trustee in default of appointment of a trustee under s. 53 of the Bankruptcy Act, 1914, need not be supported by affidavit.

MOTION to commit for contempt of Court under s. 22, sub-s. 4, of the Bankruptcy Act, 1914.

By an order of the Court, dated January 13, 1921, the bankrupt Edward Peter Whaley, comedian, was ordered to set aside from his salary and pay to the Official Receiver, 25*l.* per week, and this order was confirmed by the Court of Appeal. A similar order was made in the case of the bankrupt Harry Clifford Scott. Neither had obeyed the order. The Official Receiver was the trustee in the bankruptcies under s. 53, sub-s. 1, of the Bankruptcy Act, 1914, no trustee having been appointed. The present motion was supported by a report of the Official Receiver to the Court, and was not supported by affidavit.

E. W. Hansell for the Official Receiver.

Tindale Davis for the bankrupts. This application should have been supported by affidavit and not by the Official Receiver's report only—r. 83 of the Bankruptcy Rules, 1915 (1), and Form 125 of the Appendix of forms annexed thereto. Rule 320 (1) which says that on an application

(1) Bankruptcy Rules, 1915, r. 83 :
“An application to the Court to commit any person for contempt of court shall be supported by affidavit, and be filed in the Court in which the proceedings are.”

R. 320 : “Where for the purposes of any application to the

Court by the Official Receiver for directions, or to adjudge a debtor bankrupt, or for leave to disclaim a lease, or for an extension of time to apply for leave to disclaim a lease, or for an order to take criminal proceedings against a bankrupt, or to commit a bankrupt, it is necessary

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to commit by the Official Receiver his report shall be sufficient, and that there need not be an affidavit, only applies to applications made by the Official Receiver acting in that capacity, and not when acting in his capacity as trustee. Here he is acting as trustee under s. 53, sub-s. 1, of the Bankruptcy Act, 1914, the creditors not having appointed a trustee. In *In re Pickard* (1), which was also an application by the Official Receiver acting as trustee to commit, Phillimore J. said "the mode in which that power shall be exercised is specified in the Bankruptcy Rules, 1886 and 1890, rr. 85-88," now rr. 83-86. He said that although r. 320—then r. 333—was in existence at the time. The only matters in r. 320 which relate to applications by the Official Receiver acting as trustee are those for leave to disclaim and for an extension of time for applying for leave to disclaim.

[*In re Cohen* (2) was also referred to.]

E. W. Hansell in reply. Rule 320 (3) applies in this case. It is not, as contended, operative only as regards applications by the Official Receiver as such, but deals with three classes of application: first, applications which can be made by an Official Receiver only—e.g., to adjudge a debtor bankrupt; secondly, those which can be made by a trustee only—e.g., for leave to disclaim; and, thirdly, applications that can be made by either, e.g., for directions: see r. 321 of the Bankruptcy Rules, 1915, as to the Official Receiver, and s. 79, sub-s. 3, of the Act, as to the trustee; for an order to take criminal proceedings see s. 161; and for an order to commit a bankrupt—the present application—see s. 22. No affidavit is therefore necessary.

HORRIDGE J. In this case orders dated January 13, 1921, were made, varying an order made on September 16, 1920.

that evidence be given by him in support of such application, such evidence may be given by a report of the Official Receiver to the Court, and need not be given by affidavit, and any such report of the Official

Receiver to the Court shall be received by the Court as prima facie evidence of the matters reported upon."

(1) [1912] 1 K. B. 397, 403.

(2) [1905] 2 K. B. 704.

(3) See note (1), ante, p. 623.

The orders of January 13 directed each of the bankrupts to set aside 25*l.* a week from his salary during his engagement at the Alhambra, which engagement came to an end on February 26, 1921. Those orders were appealed from and the appeals were dismissed by the Court of Appeal. On those orders, which they have not obeyed, there is now due from Whaley 129*l.*, and from Scott 143*l.*, although since February they have each been in the receipt of a salary of over 100*l.* per week. The present motion is for an order of committal against each of them for contempt of Court. It is launched under s. 22 of the Bankruptcy Act, 1914. This non-compliance with the order of the Court comes within the latter part of sub-s. 2. I find that each of the bankrupts has wilfully failed to perform the duty imposed on him by the order of the Court within the meaning of sub-s. 4 of s. 22, and that each is liable to be committed for contempt of Court. But it is contended by Mr. Tindale Davis on their behalf that this application should have been supported by affidavit. I ought to say here that the application in the case of *In re Pickard* (1) was similar to the present one, but I find that there was an affidavit in that case, so that it does not assist me. The Court in that case, it may be noted, said that apart from their jurisdiction to commit under s. 24 of the Bankruptcy Act, 1883 (now s. 22), the Court had also a general jurisdiction to do so. Mr. Davis contends that under r. 83 of the Bankruptcy Rules, 1915 (2), an affidavit should have been filed, and craves in aid form 125, which is the form of affidavit to be used. He says that the motion not being supported by affidavit but by the report of the Official Receiver only, the proceeding is irregular, and of course on a motion to commit the Court requires the greatest regularity.

Mr. Hansell for the Official Receiver contends that r. 320 of the Bankruptcy Rules is the rule applicable. [His Lordship read it. (2)] Mr. Davis replies that that rule only applies to cases where the Official Receiver is applying qua Official Receiver, and not where he is applying in his capacity as

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(1) [1912] 1 K. B. 397.

(2) See note (1) ante, p. 623.

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trustee. In this case he is applying in the latter capacity under s. 53, sub-s. 1, because no trustee has been appointed.

Now what are the matters dealt with in r. 320? They are matters some of which can only be done by the Official Receiver in his capacity as Official Receiver, some when he is acting in either capacity, and at least one matter in which he can act only when acting as trustee. To enumerate them. An application for directions can be made by him in either capacity; to adjudge a debtor bankrupt by the Official Receiver only. Applications for leave to disclaim a lease, or for an extension of time in which to apply for leave, can be made by the Official Receiver only in his capacity as trustee. For an order to take criminal proceedings the Official Receiver can apply in either capacity, and similarly with regard to an application to commit. In my view it is quite clear that one cannot limit the meaning of Official Referee in that rule to an Official Referee acting in that capacity only, because, as I have indicated, there is at least one case, that of disclaimer, in which he cannot act otherwise than in his character as trustee. Therefore if the rule says that it applies to the Official Referee even when acting in his capacity as trustee, it is clear that his application need not be supported by affidavit. I think therefore that the order to commit must be made, but I order that it shall not issue as long as each of the bankrupts pays 25*l.* per week, the first payment to be made this day week.

Order accordingly.

Solicitor for applicant : *Solicitor to Board of Trade.*

Solicitors for respondents : *Edmond O'Connor & Co.*

W. L. L. B.

CHELLEW v. ROYAL COMMISSION ON THE SUGAR SUPPLY.

1921

Feb. 2;
March 23.

Shipping—General Average—Expenditure—Subsequent Loss of Ship and Cargo—Liability of Cargo Owner to contribute.

Where a shipowner incurs a general average expenditure, and subsequently the ship and all her cargo are totally lost, the shipowner cannot recover any contribution in general average from the owners of the cargo so lost.

AWARD stated in the form of a special case.

By an agreement dated June 23, 1920, made between R. B. Chellew as owner of the steamship *Penlee* (hereinafter called the claimant) and the Royal Commission on the Sugar Supply (hereinafter called the respondents), it was agreed that a dispute between them should be referred to Mr. F. D. Mackinnon K.C. as sole arbitrator, who made his award in the form of the following special case.

"1. In January, 1919, the *Penlee* loaded a cargo of sugar at two ports in Cuba. Various bills of lading for this cargo were issued. By such bills of lading the cargo was to be carried to Queenstown for orders, and to be delivered at the port of destination to the Royal Commission on the Sugar Supply. Each bill of lading contained the provision "General average payable according to York/Antwerp Rules." The respondents were at all material times the owners of the cargo and the holders of the bills of lading.

"2. The *Penlee* sailed from Cuba with the cargo on January 29, 1919. She encountered a hurricane upon February 10, and sustained damage to her hull and engines. In consequence of the damage her master prudently determined to put into Horta in the Azores as a port of refuge, where she arrived on February 22. At Horta certain repairs were done, and she sailed from Horta upon their completion on March 15.

"3. At Horta certain expenses of the nature of port of refuge expenses were incurred by the claimant amounting in all to 717*l.* 16*s.* 3*d.* As the damage to the ship which

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occasioned resort to Horta was of the nature of particular average, and did not arise from any general average sacrifice, the claimant would not have been entitled to assert that he had a right at common law to a contribution in general average towards any of the above expenses in view of the decision in *Svendsen v. Wallace*. (1) But under Nos. 10 and 11 of the York/Antwerp Rules, 1890, the claimant was *prima facie* entitled to say that all the above expenses amounting to 717*l.* 16*s.* 3*d.* ought to be treated as a general average expenditure. The said expenses were incurred for wages and maintenance of the officers and crew at Horta and port charges, and did not include any outlay for discharging or reloading cargo, or otherwise directly incurred in relation to the cargo or its preservation.

“ 4. The *Penlee* having sailed from Horta on March 15 for Queenstown, signs of fire on board were discovered on March 18. This fire apparently broke out in the cargo in No. 2 hold, but there was no evidence before me as to its cause. The fire increased so rapidly and seriously that on March 20 her master and crew were compelled to abandon the vessel and take refuge on another ship. The *Penlee* and her whole cargo thus abandoned were totally lost at sea.

“ 5. The claimant subsequently procured an average adjustment to be prepared by Messrs. Manley Hopkins, Son & Cookes, in which the above sum of 717*l.* 16*s.* 3*d.* was treated as a general average expenditure. This was apportioned over the steamer valued at 89,250*l.*, the cargo, valued at 140,000*l.*, and the shipowners' freight at risk, valued at 1184*l.* The value of 89,250*l.* for the steamer was the estimated value she would have had on arrival in the United Kingdom, and the value of 140,000*l.* for the cargo was the estimated value that the cargo would have had if it had arrived at the port of delivery in good condition.

“ 6. Upon the above apportionment the cargo's proportion of the 717*l.* 16*s.* 3*d.* was 436*l.* 2*s.* 2*d.* The claimant required the respondents to pay this sum of 436*l.* 2*s.* 2*d.*, but the respondents refused, and this was the dispute referred to me.

(1) (1885) 10 App. Cas. 404.

" 7. It is apparent that upon these facts there arises this question of law : If subsequently to the incurring by a shipowner of general average expenditure the ship and all her cargo are totally lost while completing the agreed voyage, can the shipowner claim any contribution in general average from the owners of the cargo so lost ? It is a question upon which I can find no authority at all directly in point, but one which has been much canvassed by the writers of text-books. I may refer to Lowndes on General Average (5th ed.), pp. 300-313, Arnould on Marine Insurance (2nd ed.), p. 938, Arnould last re-edited edition, ss. 976, 977, Carver on Carriage by Sea, ss. 428-430, McArthur on Marine Insurance (2nd ed.), pp. 204-206, Phillips on Insurance (5th ed.), ss. 1319, 1373, etc.

" 8. Entertaining, as I do, a great admiration for these authors and their books, I find it difficult, upon this particular subject, to discover that they are either in agreement or that they lay down any logical principle. I conceive, firstly, that the rule might be either (1.) general average expenditure at a port of refuge gives the shipowner an immediate right of contribution to that expenditure from the other interests then existing, and at their then values, irrespective of their subsequent fate or subsequent values ; or (2.) such expenditure gives the shipowner a right of contribution from the other interests at their value at the agreed port of destination, and if for any reason an interest otherwise liable to contribute has no value at the port of destination it cannot be made to contribute. And, secondly, I conceive that reason must be shewn to establish any logical distinction between the rule as to the right of contribution towards a general average sacrifice (e.g., if a master jettisons cargo worth 100*l.* or sacrifices a mast worth 100*l.*) and the rule as to the right of contribution towards general average expenditure (e.g., if the master expends 100*l.* on port of refuge expenses).

" 9. The two earliest of the authors above referred to seem to draw a distinction between the rule as to sacrifice and as to expenditure, and as regards expenditure to lay down the first of my above suggested rules. This is clear in Phillips, ss. 1317, 1319, 1373 and 1374, though his statement in s. 1374 that

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'in case of expenditures, which are absolutely reimbursable the value, at the time of incurring them, ought to contribute,' seems to involve a *petitio principii*: the question is whether they are absolutely reimbursable at the time of incurring them. Sir Joseph Arnould (2nd ed.) in ss. 344, 345 seems to agree with Phillips. He presumably implies in s. 344, though he does not seem to say so expressly, that contribution to general average expenditure is to be made upon values as they existed at the time of the expenditure being incurred.

"10. I think there are several objections to this view of Phillips, of which I may mention one that seems the most serious. It is elementary that the basis of value for contribution must be the same as the basis of value of the thing sacrificed which is to be made good. If cargo is jettisoned it is clear law that the value to be made good to its owner is the value it would have at the port of adjustment: *Fletcher v. Alexander*. (1) If, when entering Horta, the master had jettisoned part of the respondents' cargo, that loss must have been made good to them on the value of the cargo jettisoned that it would have had in the United Kingdom (that being the proper place of adjustment), and that loss would have been contributed to upon the values of ship, freight and cargo (including the amount made good to the cargo) as in the United Kingdom. Yet at the same time, on Phillips' rule, the shipowner's general average expenditure would have to be made good to him on a different basis of contributory values, viz., the values at Horta. There would need to be two separate adjustments. And if the cargo at Horta had sustained damage that was likely to increase with time, as in *Fletcher v. Alexander* (1), the cargo owner would contribute to the general average expenditure upon a higher value than the value made good to him for the general average sacrifice.

"11. The later writers do not agree with the conclusion of Phillips and of Sir Joseph Arnould. Carver in ss. 428 and 429 (I refer to the 4th ed., which is, I think, the last by Judge

(1) (1868) L. R. 3 C. P. 375.

Carver himself) lays down that in general average there is no distinction between the right of contribution arising from sacrifice and that arising from expenditure, and that in general my second suggested rule in para. 8 is correct. But he makes an exception exist as to both these propositions, and this exception arises solely in the event of both ship and cargo being totally lost subsequently to general average expenditure being incurred. In the result if after general average expenditure is made the ship arrives but all the cargo is lost, the shipowner (as he expressly says) has no right of contribution, i.e., my suggested second rule applies. If, however, after the expenditure is incurred both ship and cargo perish, the shipowner has a right of contribution from the owner of the lost cargo, though apparently Carver would have the contribution assessed not on the values as they existed at the time the expenditure was incurred, but upon the values as they would be if the ship and cargo had arrived (the method adopted by the adjusters in the present case), thus differing from Phillips in his s. 1374.

" 12. I confess I cannot think there is any logical ground on which this exception to the general rules can be allowed to exist. To make it seems to me to be reducing the adjustment of general average to the measure of the adjuster's foot, and leaving him to make an allowance to a party in any case in which he thinks it fair to do so. Moreover, the suggested hardship (that the shipowner, having made the expenditure and having lost his ship, is in a poor way unless he can get contribution from the owners of the lost cargo) which prompts the admission of the exception, does not, I think, exist under the conditions of commerce. The shipowner in this case after expending 71*l.* 16*s.* 3*d.* at Horta could have insured that sum by a policy on average disbursements on the voyage from Horta to the United Kingdom against the risk of the total loss of the ship and cargo, or against the risk of the loss of cargo involving the loss of any contribution from cargo (e.g., *Briggs v. Merchant Traders' Association* (1)), and I think he could have added the premium for this insurance to the

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717l. 16s. 3d. as part of his general average expenditure reasonably incurred.

" 13. McArthur (loc. cit.) in his text states that the practice of adjusters is to follow my suggested second rule, and in a footnote discusses the present question. He seems to deprecate any distinction between the right arising from sacrifice and from expenditure, and any departure from the rule that contribution is to be assessed upon ultimate values, but to suggest that if those ultimate arrived values are insufficient (query for contribution either to sacrifice or to expenditure ?) assessment should be made upon such values as but for subsequent disaster would have arrived.

" 14. The present editors of Arnould reproduce in s. 976 Sir Joseph Arnould's own words in his s. 344 (p. 938 of 2nd ed.), to which I refer above as being in agreement with Phillips. In s. 977 they refer to and criticise the above-mentioned passages in Carver and McArthur.

" 15. In Lowndes (5th ed., loc. cit.) arguments are set out for and against the desirability of one rule or the other. They do not seem to be of much assistance in ascertaining what in fact is the rule of the common law. And in so far as these arguments deal with the master's supposed authority to bind the cargo by incurring general average expenditure, I think they rest on a fallacy. If a master requests, or allows, salvors to render salvage assistance, he no doubt incurs a liability for and on behalf of the cargo; the salvors have a direct claim against the cargo and its owners. If a shipowner pays cargo's proportion of salvage he must reclaim it from cargo owners, not as contribution to a liability he has incurred, but as indemnity for a payment he has made on behalf of, and as agent for, the person directly liable. But if the master pays port charges or crew's wages at a port of refuge, that is a liability incurred by him only for his owner. In deciding the extent of the owners' right of contribution to that liability from others it does not seem of service to import considerations as to the master's authority to incur direct liabilities for those others.

" 16. The case *The Mary Thomas* (1) cited in this

(1) [1894] P. 108.

connection in Lowndes at p. 313 seems irrelevant. It concerns the rights and liabilities of assured and underwriters on a policy. In discussing the law of general averages as between the parties to the contract of affreightment, reference to the subsequent and distinct question of the rights of those parties as against their respective underwriters is usually misleading. One of the soundest remarks about general average was that made by the late Mr. Lowndes himself (4th ed., 1888, preface, p. x): 'The subject of general average can never be so well understood as when it is studied apart from insurance, with which it is only accidentally associated, and as an outlying branch of the law of affreightment, to which it naturally belongs.'

" 17. The most relevant authorities seem to me to be the following:—*Birkley v. Presgrave* (1), in which it is to be noted that there was expenditure as well as sacrifice: twelve men were got on board to pump, and were paid half a guinea apiece, 'they refusing to do so under that sum'; and Lawrence J. in his celebrated definition includes 'expenses incurred' as well as 'sacrifices made.' *Fletcher v. Alexander* (2), as to which the considerations I have indicated in para. 10 seem pertinent. *Ocean Steamship Co. v. Anderson* (3), in which I think Brett M.R. implies that the arrival of the cargo was a necessary condition of its liability to contribute to the general average expenditure. The relevancy of his judgment does not seem to be affected by the fact that the House of Lords (4) ordered a new trial in order that it might be ascertained whether the amount of the general average expenditure was reasonably incurred.

" 18. My own conclusion is that the rules of the common law are as follows:—

- (i) The right of a shipowner to contribution in general average is the same, whether his claim is for contribution to a general average sacrifice or for contribution to general average expenditure.
- (ii) The extent of the right of a shipowner to contribution

(1) (1801) 1 East, 220.

(2) L. R. 3 C. P. 375.

(3) (1883) 13 Q. B. D. 651.

(4) (1884) 10 App. Cas. 107.

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in general average is the same as the extent of the right to such contribution of any other party to the contract of affreightment.

(iii) A claim to contribution in general average by any party to the contract of affreightment must be assessed upon the properties of all parties to that contract upon the values of such properties at the port of adjustment, and the port of adjustment, if the voyage has not been abandoned at an earlier port, is the port of the agreed destination under that contract.

(iv) If the property of any party to the contract of affreightment who is called upon to contribute in general average to another party or parties has no value at the port of adjustment, either by its arrival in a worthless condition or by its not arriving at all, that party cannot be made to contribute.

“ 19. I should arrive at the same result in the present case upon another and narrower ground. The shipowner's right to treat this sum of 717*l.* 16*s.* 3*d.* as general average expenditure arises solely as a matter of contract, by the incorporation in the bills of lading of the York/Antwerp Rules, 1890 (see para. 3 above). In construing the contract so made I think Nos. 10 and 11 of the rules must be read in conjunction with No. 17, and that so construed the result is the same as I have suggested in para. 10.

“ 20. I award that the claimant is not entitled to recover the sum of 436*l.* 2*s.* 2*d.*, or any sum, from the respondents. I direct that the claimant shall pay the costs of this my award, and if the respondents shall in the first place pay such costs the claimant shall repay them. And I direct that the claimant shall pay to the respondents their costs of the reference to be taxed if not agreed.

“ 21. If the Court shall be of opinion that the claimant is entitled to claim contribution in general average from the respondents to the said sum of 717*l.* 16*s.* 3*d.* and is entitled to have such contribution assessed upon the values of ship, freight and cargo as they would have been at the port of

destination if the voyage from Horta had been safely accomplished, then I award that the claimant shall recover from the respondents the sum of 436*l.* 2*s.* 2*d.* I direct in that case that the respondents shall pay the costs of this my award, and if the claimant shall have paid such costs they shall repay them to him. And I direct that the respondents shall pay to the claimant his costs of the reference to be taxed if not agreed.

“ 22. If the Court shall be of opinion that the claimant is entitled to claim contribution in general average from the respondents to the said 717*l.* 16*s.* 3*d.*, and is entitled to have such contribution assessed upon the values of ship, freight and cargo as they existed at Horta, then I award that the claimant is entitled to recover from the respondents such proportion of 717*l.* 16*s.* 3*d.* as the value of the respondents' cargo at Horta bore to the combined values at Horta of the ship, the freight at risk and the said cargo, and in this case I make the same directions as to costs as in para. 21.

“ 23. As I have in this award so signally broken the salutary rule that an arbitrator should not give his reasons, I may perhaps add that the parties came before me in entire agreement as to the facts of the case and differing solely as to the law. Since they referred this their difference to me I have thought that I ought to decide it and not merely to hand on the problem to the Court. In doing so I have desired to make my decision at any rate intelligible, leaving it to the Court to determine whether it is intelligent.”

Jowitt for the claimant.

Le Quesne for the respondents.

Cur. adv. vult.

March 23. SANKEY J. read the following judgment : This is a special case stated by a legal arbitrator to raise the following question of law : If subsequently to the incurring by a shipowner of general average expenditure the ship and all her cargo are totally lost while completing the agreed voyage, can the shipowner claim any contribution in general average from the owners of the cargo so lost ?

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The facts are as follows. [His Lordship read paras. 1, 2, 3, 4, 5 and 6 of the special case.]

The question which falls for determination is not easy to decide. There is apparently no judicial authority on the matter, but it is one which has been considerably discussed by distinguished jurists who have written upon the subject—namely, Arnould on Marine Insurance, Carver on Carriage by Sea, Lowndes on General Average, McArthur on Marine Insurance, Phillips on Insurance. These authors differ from one another without always assigning the most satisfactory reasons for their conclusions.

With regard to general average sacrifice the law would appear to be settled. Bovill C.J. in the case of *Fletcher v. Alexander* (1) says: "If, however, after the jettison or the matter which is the subject of average has arisen, the remainder of the goods are totally lost, and so no benefit accrues to the owners of the other goods from the jettison, no contribution can be claimed. The whole law on the subject is founded on the principle that the loss to the individual whose goods are sacrificed for the benefit of the rest is to be compensated according to the loss sustained on the one hand and the benefit derived on the other." Lowndes at p. 302 of the 5th ed. says: "On this point all the authorities, and the practice, are agreed. The question as to which there is room for difference of opinion is, whether the rule thus laid down for jettison is to be applied to the case of expenditures." Both Phillips, 5th ed., ss. 1317 and 1319, and Arnould, 9th ed., s. 976, distinguish between sacrifice and expenditure, the latter saying: "As regards sacrifice, then, the law is clear. But in the case of expenditures attention must be paid to some different considerations." He sets them out and concludes the section by saying: "Hence, the long established rule used to be that disbursements for the general benefit must be fully reimbursed in general average, whether the ship and cargo be eventually saved or not." But at s. 977 he states: "Notwithstanding these considerations, however, the general practice of adjusters is, as we have already observed, not to

(1) L. R. 3 C. P. 375, 382.

give practical effect to this distinction, but to allow contribution, and to assess the contributory values, in all cases with respect to the state of facts as existing at the port where the adventure is terminated, whether the claim for contribution arise out of sacrifices or expenditures. In neither case, therefore, does any property contribute which does not ultimately arrive, and such property, moreover, only contributes on its arrived value." On the other side there is the authority of Carver (6th ed.), who states (s. 428): "Hence it has been repeatedly laid down by writers of authority, both in England and in the United States, that the rule as to contribution to an expenditure is different from that as to a sacrifice. It is said that all the parties interested in the adventure become, there and then, as soon as the advance is made, liable to repay their shares, and that those shares should be in proportion to the values of the property at the time of the expenditure, without regard to subsequent losses or deterioration. There has not, however, been any decision on the point, and adjusters in practice do not recognise the supposed distinction. They take the state of things at the termination of the adventure as the basis for contribution, both with regard to sacrifices and expenditures." It is therefore established in the case of a sacrifice that the contributions shall be in proportion to the benefits ultimately derived. The reasons for this equally apply (with the one reservation) in the case of an expenditure. The rule of law should therefore, if possible, be the same in both cases. And of McArthur, 2nd ed., p. 205, footnote (a), who says: "There appears, therefore, no sufficient reason for altering the rule that, with the exceptions above mentioned, contribution to expenses should be made upon the same basis as to sacrifices, namely, upon the net value of the property at the termination of the adventure, i.e., assuming that the amount of the general average is within the net value of the property."

To sum up the matter Phillips and Arnould appear to distinguish between sacrifice and expenditure, Carver and McArthur appear to treat them on the same footing subject to certain exceptions, one of which is stated by Carver in the

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above-mentioned section to be that: "If, after general average disbursements have been made, a total loss of ship and cargo occurs, it seems clear that the disbursements should not be borne by the shipowner entirely; or if the value of what is ultimately saved of the adventure is less than the expenditure, it is equally clear that the excess of expenditure should not fall wholly either on the shipowner, or on the owners of what has been saved."

Lowndes, 5th ed., at p. 302, sets out the argument on both sides with a leaning to the view held by Arnould. Those who are in favour of distinguishing between sacrifice and expenditure contend that an expenditure of a nature as in the present case incurred in the middle of a voyage constitutes a debt which at the moment it is incurred is due rateably from each contributor. Their opponents argue (1.) that the state of facts at the termination of the venture is to be regarded; (2.) that the claim to contribution in general average must be assessed upon the value of the property of all parties to the contract of affreightment at the port of adjustment; (3.) that if the voyage has not been abandoned at an earlier port, the port of adjustment is the port of the agreed destination under the contract.

In my opinion the arguments in favour of taking the state of facts at the termination of the venture are more weighty, especially because: (1.) The value of the property when it reaches the hands of its owners can be ascertained with precision. (2.) There ought to be only one adjustment of the nature of general average. Endless confusion would result from a multiplicity of adjustments made on a multiplicity of different considerations. (3.) The whole law depends, as was said in *Fletcher v. Alexander* (1), on the loss to the one and the benefit, that is, in my view, the ultimate benefit to the other: see Lowndes, p. 303. It is true that Carver, as above pointed out, suggests one reservation to the principle that contributions in the case of expenditure should be the same as in the case of a sacrifice—namely, in proportion to the benefits

(1) L. R. 3 C. P. 375, 382.

ultimately derived—but he appears to me to give no good or logical reason for this reservation.

It was urged that in *The Mary Thomas* (1) the Court of Appeal, affirming Gorell Barnes J., as he then was, suggest a distinction between a sacrifice and an expenditure, but that case was not a direct decision on the law of general average, but upon the rights of a shipowner under an insurance policy, where different considerations may apply. Neither do I think that the case of expenditure by a ship's master in reward of salvage operations is a true analogy or a safe guide, because if a shipowner pays a cargo's proportion of salvage he must reclaim it from the cargo owners not as a contribution to a liability he has incurred, but as indemnity for a payment he has made on behalf of and as agent for the person directly liable.

I agree with the conclusions stated by the learned arbitrator in para. 18 of the special case, which are as follows. [His Lordship read them and continued:] I think (1.) on the question of principle the law demands the loss of the one and the ultimate benefit of the other, and (2.) on the question of practice certainty and convenience instead of confusion are to be obtained by one adjustment at the port of destination. Applying that question of principle and that question of practice to the present circumstances, I am of opinion that as no cargo arrived at the port of destination the shipowner is not entitled to claim contribution from the cargo owners, and the award of the arbitrator must therefore be upheld.

Award upheld.

Solicitors for claimant: *Holman, Fenwick & Willan.*

Solicitors for respondents: *Waltons & Co.*

(1) [1894] P. 108.

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April 14, 19.

ROBINSON v. MARSH.

[1920. R. 1004.]

Gaming—Money lost by playing at Cards—Cheque for larger Amount given in Payment—Consideration for Cheque partly valid—Actual Payment of Cheque by Drawer—Claim to recover Amount of Money lost at Cards—Gaming Act, 1835 (5 & 6 Will. 4, c. 41), ss. 1, 2.

By s. 1 of the Gaming Act, 1835, notes, bills, and mortgages, which were by certain Acts of Parliament declared to be void, including notes, bills, and mortgages given as security for money lost by playing at cards, are to be deemed to be made, drawn, accepted, given or executed for an illegal consideration.

By s. 2: "In case any person shall . . . make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is" by the aforesaid Acts of Parliament "declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law in any of His Majesty's Courts of Record."

The plaintiff lost 2685*l.* in playing at cards with the defendant. He gave the defendant in payment therefor a cheque for 2700*l.* drawn upon his bank, the difference—namely, 15*l.*—being handed by the defendant to the plaintiff in cash. The cheque was indorsed by the defendant and paid into his bank, and was duly met by the plaintiff's bank upon presentation. The plaintiff brought an action to recover 2685*l.* under s. 2 of the Gaming Act, 1835:—

Held, that the cheque was a bill within s. 2 of the Gaming Act, 1835, and that it had been "actually" paid by the plaintiff; secondly, that the considerations for the cheque could be severed and that the plaintiff was entitled to maintain his action and recover in respect of the illegal consideration.

ACTION tried by McCardie J.

The plaintiff claimed to recover 2685*l.* as money paid for and on account of the defendant.

The following statement of facts is taken from the judgment: In March, 1920, the plaintiff played at cards with the defendant. He lost 2685*l.* He gave a cheque to the defendant for 2700*l.* The difference between the two figures—namely, 15*l.*—represented a sum in cash which the defendant

handed to the plaintiff at his request as an ordinary payment and irrespective of the card losses. Hence the plaintiff sues for 2685*l.* only. The cheque for 2700*l.* was drawn by the plaintiff upon his account at the Bank of Liverpool, *Ld.* It was indorsed by the defendant and paid by him into his account at the London City and Midland Bank. It was duly met by the plaintiff's bank upon presentation.

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Valetta for the plaintiff.

Beresford for the defendant.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

April 19. McCARDIE J. read the following judgment: This action rests on s. 2 of the Gaming Act, 1835. It is framed on the assumption that *Dey v. Mayo* (1) is correct. The defendant has raised however two points, one of which is independent of the result of the pending appeal to the House of Lords in that case.

The facts here lie within a narrow compass. [His Lordship stated the facts set out above and continued:] Upon those facts Mr. Beresford, for the defendant, submitted two points—namely, (1.) That here there was no “actual” payment by the plaintiff within s. 2 of the Gaming Act. (2.) That the section does not in any event apply to a cheque with respect to which part of the consideration is illegal and the residue of the consideration valid. I take these two points separately.

First, Did the plaintiff actually pay this cheque? Mr. Beresford argued that this point was not definitely raised or decided as a separate question in *Dey v. Mayo*. (1) This is correct. Undoubtedly, however, the Court of Appeal there assumed as plain that a man “actually” paid within s. 2 when the cheque upon his bank was duly met by them on his behalf. I asked Mr. Beresford to define the meaning of the words “actually pay.” Despite his ingenious observations he could give no satisfactory response. The point

(1) [1920] 2 K. B. 346.

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can scarcely be considered without mention of the other words in s. 2—namely, “In case any person shall . . . make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is by” the aforesaid Acts of Parliament “declared to be void, and such person shall actually pay to any indorsee, holder, or assignee, etc.” For if the word “bill” includes a cheque then it must, I think, clearly follow that payment of a cheque by a banker in the usual way should fall within the words “actually pay.” In substance I think that Mr. Beresford’s argument was a contention that a cheque on a banker was not a “bill” and did not fall within the documents mentioned in the Act of 1835. I cannot accept this contention. The question arose in the most definite manner in *Lynn v. Bell* (1) before Palles C.B. and Fitzgerald and Deasy BB. They held, affirming Morris C.J. (afterwards Lord Morris), that the word “bill” in the Act of 1835 did include a cheque. I am aware that in *Dey v. Mayo* (2) the language of Palles C.B. was criticized by Bankes and Scrutton L.JJ. But neither of those Lords Justices nor Atkin L.J., the other member of the Court, cast any doubt on the ruling in *Lynn v. Bell* (1) that a cheque was a bill within s. 2, or that “actual” payment could be made by means of a banker’s cheque. In my opinion the decision in *Lynn v. Bell* (1) on this point was clearly right. It is quite true, as Mr. Beresford points out, that in 1835 cheques were comparatively little employed as compared with their wide user at the present day. But they were quite well known and were, I think, correctly regarded as bills of exchange. A cheque was and is a bill of exchange with peculiar features. It is well said in Halsbury’s Laws of England, vol. ii., p. 460, that “cheques are a special form of bills of exchange, comparatively modern in origin, which take the place of the notes formerly issued by bankers in return for the money of the customer deposited with them, and illustrate strikingly the adaptability of the law merchant.” The matter is tersely put thus in Chalmers on Bills of Exchange (8th ed.), p. 284: “All cheques are bills of exchange,

(1) (1876) Ir. R. 10 C. L. 487.

(2) [1920] 2 K. B. 346.

but all bills of exchange are not cheques." In the 1866 edition (9th ed.) of Byles on Bills, p. 13, it is said: "A check on a banker is, in legal effect, an inland bill of exchange, drawn on a banker, payable to bearer on demand": see also *Keene v. Beard*. (1) That the use of a cheque on a banker, though described as comparatively modern, is yet of some antiquity will be seen from *Boehm v. Sterling*. (2) There Lord Kenyon C.J. clearly indicated that in substance a "bankers' check" was on the same footing for many purposes as an ordinary bill of exchange. I imagine that in 1835 the Legislature was well aware of the prevailing opinion of lawyers on the matter. In *Eyre v. Waller* (3) it was held that a cheque on a banker was a bill of exchange within the Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67). The words in that Act were "bills of exchange or promissory notes." As Pollock C.B. said (4): "According to the notion of lawyers, a check is a bill of exchange." The Bills of Exchange Act, 1882, s. 73, gives this definition: "A cheque is a bill of exchange drawn on a banker payable on demand." I gather from the judgment of Lord Blackburn in *M'Lean v. Clydesdale Banking Co.* (5) that this definition is declaratory of the prior law. In that case Lord Selborne incidentally observed (6): "Cheques are bills of exchange though they do not include certain privileges."

. Now I think that there is one matter which shows clearly and indeed conclusively that cheques are "bills" within s. 2 of the Act of 1835. For s. 1 of that Act also refers to a "note, bill and mortgage." It seems clear that those words must bear the same meaning in both sections. It has been expressly or impliedly held several times by the Court of Appeal that the word "bill" in s. 1 includes a cheque: see *Woolf v. Hamilton* (7), *Moulis v. Owen* (8), and *Hyams v. Stuart King*. (9) In this last case Fletcher Moulton L.J. in his dissenting judgment (10) uses the phrase "bills (a word

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(1) (1860) 8 C. B. (N. S.) 372.

(2) (1797) 7 T. R. 423.

(3) (1860) 5 H. & N. 460.

(4) *Ibid.* 463.

(5) (1883) 9 App. Cas. 95.

(6) (1883) 9 App. Cas. 103.

(7) [1898] 2 Q. B. 337.

(8) [1907] 1 K. B. 746.

(9) [1908] 2 K. B. 696.

(10) *Ibid.* 714.

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which includes cheques)." I venture respectfully to think that he is clearly correct in that statement. I hold that a cheque is a bill within s. 2 of the Act of 1835.

It is of course well settled that the giving of a cheque is a conditional payment, and when met is a complete payment. Thus, e.g., in *Bridges v. Garrett* (1) Cockburn C.J. said: "If, however, payment is made by cheque, and the cheque is duly honoured, that is a payment in cash": see, too, Chalmers on Bills (8th ed.), pp. 352 et seq.

The words "actually pay" in s. 2 refer, I think, not to the method of payment (e.g., by cheque as compared with bank notes), but to the reality of payment. The object of the word "actually" was to show that the mere liability to pay a cheque held by a third person would not suffice to base an action against the original recipient. There must be real payment as distinguished from mere obligation to pay. This view accords, I think, with good sense as well as with the object of the section. I should not desire to limit the word "payment" to a payment in cash or notes. In ordinary cases of debtor and creditor payment may be effected in divers ways, e.g., by goods, or by services rendered, or the like, or even by the mere transfer of figures in an account by way of set-off: see the cases collected in Stroud, vol. iii., Title "Payment," and Leake on Contracts (6th ed.), p. 649. But for the purposes of s. 2 and in order to give effect to the words "actually pay" I think that a plaintiff must show either a payment in cash or that which is substantially equivalent to a payment in cash. Arbitrary or unusual methods of payment (though good in ordinary cases) will not, I think, suffice for s. 2. To hold otherwise would encourage subtle devices. The point does not now arise for determination before me, and therefore I do not deal with it further. The plaintiff here has paid in cash through his bankers.

There remains the second point for decision—namely, whether the plaintiff is debarred from recovering by reason of the fact that a portion only of the cheque represented an

(1) (1870) L. R. 5 C. P. 451, 454.

illegal consideration. This point is novel. I do not think that the figure of 15*l.* is one to which I can apply the de minimis doctrine. Now s. 2 provides that where a "note, bill or mortgage" is paid under circumstances to which the section applies "such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law in any of His Majesty's Courts of record." The action so brought might, in the days of strict pleading, have been based either on debt or assumpsit: see *Gilpin v. Clutterbuck*. (1) It would, I conceive, be curious if a man could recover under s. 2 where the whole bill or cheque was for an illegal consideration, but should fail where a part only of the security was for an illegal consideration. Yet such is the ingenious argument of the defendant here. The position of bills or cheques given for illegal consideration and sued upon in the ordinary way seems fairly clear. If any part of the consideration be illegal the holder (unless he be a holder in due course) cannot apparently recover on the instrument. As it was put by Collins M.R. in *Moulis v. Owen* (2): "As the action here is on a cheque, the objection to part of the consideration is an answer to the entire claim." He then refers to Byles on Bills (16th ed.), p. 170. That treatise contains these useful paragraphs and cites the appropriate decisions: "If part of the consideration of a bill or note be fraudulent or illegal, the instrument is vitiated altogether. Where the parties have woven a web of fraud or wrong, it is said to be no part of the duty of Courts of Justice to unravel the threads." "If a bill originally given upon an illegal consideration be renewed, the renewed bill is also void, unless the amount be reduced by excluding so much of the consideration for the original bill as was illegal." It is well however to compare the statements made and the authorities given in Leake on Contracts (3rd ed.),

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(1) (1849) 13 L. T. (O. S.) 71.

(2) [1907] 1 K. B. 753.

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pp. 547 and 677. Now the principle of indivisibility may be sound and proper when the holder of a vitiated instrument (not being a holder in due course) sues upon it. He founds upon one entire contract contained in one writing. The illegality seems inherent in the instrument. But in the case of an action under s. 2 of the Gaming Act, 1835, the plaintiff does not sue on the illegal security. He rests his claim upon a statute, and he sues in a particular form to enforce a particular cause of action. Hence I see no reason for refusing to recognize in such a case a divisibility of the consideration for which the instrument has been given. This rule of divisibility in cases of partial failure of consideration as contrasted with illegal consideration has long been recognized as between immediate parties to bills, notes, and cheques. Thus in *Darnell v. Williams* (1) the plaintiff sued on a bill of exchange for 19*l.* 5*s.* The defendant proved that 10*l.* only of the bill was for valuable consideration and that the balance of 9*l.* 5*s.* was for the accommodation of the plaintiff. It was held by Lord Ellenborough that as between the parties the bill was for 10*l.* only : see, too, the authorities cited in Byles on Bills (16th ed.), pp. 154-5, and Chalmers on Bills (8th ed.), p. 115. If, e.g., a buyer accepts a bill for 100*l.* for two bales of cotton, and the vendor supplies but one, then in an action on the bill, the vendor can recover but 50*l.* : see *Agra and Masterman's Bank v. Leighton*. (2) The principle, however, appears to apply only where the failure of consideration is for an ascertained and liquidated amount : see the textbooks and authorities above referred to and cf. *Seymour v. Pickett*. (3)

There is thus no inherent difficulty in separating the several considerations of a bill of exchange or cheque in proper cases, and I see no reason why either upon legal principle or good sense I should fail to separate them here. To refuse to allow the plaintiff to recover merely because a part of the consideration is not illegal would defeat the object of the statute. It would be strange indeed to hold that if the

(1) (1817) 2 Starkie, 166.

(2) (1866) L. R. 2 Ex. 56, 65.

(3) [1905] 1 K. B. 715.

whole consideration be illegal the plaintiff can recover, whereas if part only be illegal he cannot recover at all. I cannot accept such a position. It is true that s. 2 does not expressly contemplate such a state of facts as that now before me. But the Act must be reasonably interpreted, and should be applied upon the basis of sound sense in so far as that is agreeable to established legal principles.

I therefore give judgment for the plaintiff for 2685*l.*, that is, for the amount of the 2700*l.* cheque less the 15*l.* which was cash admittedly advanced by the defendant to the plaintiff.

Judgment for plaintiff.

Solicitors for plaintiff : *Tarry, Sherlock & King, for Reuben Cohen, Stockton-on-Tees.*

Solicitors for defendant : *S. Myers & Co.*

R. F. S.

PIGGOTT *v.* ASSESSMENT COMMITTEE OF
CUCKFIELD UNION.

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April 6, 8.

Rates—Tithe Rentcharge—Assessment of—Deduction of usual Tenants' Rates—Tithe Rentcharge (Rates) Act, 1899 (62 & 63 Vict. c. 17), s. 1.

By s. 1 of the Tithe Rentcharge (Rates) Act, 1899: "The owner of tithe rentcharge attached to a benefice shall be liable to pay only one half of the amount of any rate to which this Act applies, which is assessed on him as owner of that tithe rentcharge, and the remaining half shall . . . be paid by the Commissioners of Inland Revenue":—

Held (by Darling and Horridge JJ., Avory J. dissenting), that in the calculation of the rateable value of tithe rentcharge the whole of the rates to which it is subject ought to be deducted, and not merely one half.

The above section does not affect the assessment of the rentcharge in the valuation list on which the rate is subsequently based, but only the quantum of the rate which a particular class of owner—namely, the owner of a rentcharge which is attached to a benefice—is liable to pay.

CASE stated under Baines' Act (12 & 13 Vict. c. 45, s. 11) on an appeal to the East Sussex Quarter Sessions against a rate for the relief of the poor.

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1. The appellant is the owner of a tithe rentcharge under the Tithe Commutation Act, 1836, the Tithe Commutation Amendment Act, 1837, and the Tithe Act, 1891.

2. The said tithe rentcharge is attached to the benefice of the parish of Hurstpierpoint, which is in the Cuckfield Union in the County of Sussex. The appellant is the rector of the said parish, and the respondents are the Assessment Committee of the said Union.

3. On or about March 1, 1918, the respondents assessed the said tithe rentcharge in their valuation list for the said parish at the gross and rateable value of 813*l*.

4. Under the Tithe Rentcharge (Rates) Act, 1899, the appellant is liable to pay only one-half of the rates assessed on him as owner of the said tithe rentcharge, the other half being paid by the Commissioners of Inland Revenue.

5. In calculating the gross and rateable value of the said tithe rentcharge the respondents deducted (*inter alia*) the sum of 134*l*. 13*s*. for rates payable thereon, being half the amount of the rates thereon for the current year, on the ground that the appellant was only liable to pay one-half of such rates by virtue of s. 1 of the Tithe Rentcharge (Rates) Act, 1899.

6. On October 4, 1919, a rate of 3*s*. 5*d*. in the £ in respect of the said tithe rentcharge was assessed on the appellant as such owner based on the value in the said valuation list.

7. The appellant gave notice of objection to the respondents against such valuation list, and contended that he was over-assessed, and also that in calculating the gross and rateable value of the said tithe rentcharge the whole of the rates for the current year ought to be deducted. The respondents thereupon reduced the said assessment from 813*l*. gross and rateable to 759*l*. gross and rateable value on other grounds, but decided that in arriving at the gross and rateable value of the said tithe rentcharge only half the rates for the current year ought to be deducted.

8. On June 4, 1920, the appellant gave notice of appeal against the said rate to the Quarter Sessions for East Sussex, and thereupon this case was stated by consent for the opinion of the Court.

The question for the opinion of the Court is whether the whole of the rates assessed upon the said tithe rentcharge ought to be deducted in order to arrive at its gross and rateable value or whether only half of such rates ought to be so deducted. If the Court is of opinion that the whole of such rates ought to be deducted then this appeal is to be allowed, and the gross and rateable value of the said tithe rentcharge is to be altered to 634*l.*, and the rate appealed from is to be amended accordingly. If the Court is of opinion that only half of such rates ought to be deducted, then the appeal is to be dismissed, and the gross and rateable value of the tithe rentcharge is to remain at 759*l.*

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Hon. Sir Malcolm Macnaghten K.C. and *Willoughby Williams* for the appellant. In 1836 the Tithe Act (6 & 7 Will. 4, c. 71) was passed, which by s. 67 abolished tithe in kind and substituted therefor a tithe rentcharge, and s. 69 of that Act provided that the tithe rentcharge should be subject to rates just as tithe had previously been. In the same year was passed the Parochial Assessments Act (6 & 7 Will. 4, c. 96). That Act introduced a uniform system of rating in all parishes, the rate being based on "the rent at which (the premises) might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rentcharge, if any," less certain deductions for repairs and insurance. The words "free of all usual tenant's rates and taxes" are now, since the Valuation (Metropolis) Act, 1869, understood to mean "if the tenant undertook to pay all usual tenant's rates and taxes." Tithe rentcharge being the subject of rates, we have to imagine a hypothetical tenant who would take a lease of the rentcharge from year to year, and the question is, what rent such a tenant would give on the terms of his paying all the usual tenant's rates and taxes? The rates on tithe rentcharge have now, by s. 6 of the Tithe Act, 1891 (54 & 55 Vict. c. 8), to be assessed on and recovered from the owner of the rentcharge in the like manner as on and from any occupying ratepayer; and as the full rates would be assessed on an occupying ratepayer

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(1) (1865) L. R. 1 Q. B. 16, 18.

of benefiting the parish as well at the expense of the general taxpayer.

Konstam K.C. and *Flowers* for the respondents. *Reg. v. Dodd* (1) is distinguishable. There there was a special agreement by the landlord to compound for the rates, and the remission of liability for half the rates was personal to the party so compounding; whereas under the Act of 1899 the remission of such liability applies to all owners of tithe rentcharges attached to benefices, it is not a personal matter. The gross value of premises on which the rates are based is the sum which the hypothetical tenant could afford to pay if he paid the rates out of his own pocket, and if he has only to pay half the rates he would take that into consideration when agreeing the rent. The special rates fixed by an Act of Parliament like the Act of 1899 are the "usual" rates of the particular class of hereditaments to which the Act relates. "Free of all usual tenant's rates" means free of all the rates that he has to pay, not free of all the assessments that are made on the tenant. In *Slade v. Bristol Overseers* (2) the appellant was the owner of a cottage in Bedminster which was let at 7s. a week, the owner agreeing with the tenant to pay all rates. By a local Act Bedminster was incorporated in the parish of Bristol, and it was provided by that Act that for a period of ten years the owners and occupiers of rateable hereditaments in the incorporated area should be assessed at a rate in the £ less by 1s. 4d. than similar property in other parts of Bristol. The appellant contended that he was over-assessed in respect of the said cottage in that for the purpose of arriving at the gross estimated rental the amount deducted in respect of rates was, not that of the full rate levied on those parts of the parish which were not subject to differential rating, but the lower rate actually levied on him under the local Act. The recorder of Bristol, before whom the appeal was brought, overruled that contention and dismissed the appeal on the ground that the differential rate in Bedminster affected the property and not the particular owner or occupier. On a case being stated the Divisional Court

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(1) L. R. 1 Q. B. 16, 18.

(2) (1906) 74 J. P. Newspaper, 629.

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upheld the recorder. They held that the hypothetical tenant, who would for the ten years pay the usual tenant's rates and taxes at a lower rate, would give a higher rent for the premises. That supports the respondents' contention. In *Smith v. Birmingham Corporation* (1) it was provided by a Waterworks Act that the charge for the supply of water for domestic use should be at a rate varying with the annual rent of the premises. The appellant was the owner of certain houses supplied with water under the Act. The houses were let at weekly rents, the appellant paying all rates charged thereon. As an owner he was allowed under the Poor Rate Assessment and Collection Act, 1869, a deduction of 30 per cent. of the full amount of the poor rate which an occupier if rated would have paid. It was held that in order to arrive at the "annual rent" on which the water rate was computed the amount of the poor rates paid was rightly deducted, but the appellant was not entitled to deduct the full amount of the rates which an occupier, if rated, would have paid. The Court there said: "We do not think that the legislature intended, nor has it anywhere provided, that, in estimating charges which he has to pay, he can deduct in respect of such outgoings from the annual value upon which he is to be rated more than the sums which he in fact pays." *Hackney and Lamberhurst Tithe Commutation Rentcharges* (2) shows that the proper method of assessing tithe rentcharge is to assess it on gross receipts less the necessary expenses, and as the Tithe Rentcharge (Rates) Act, 1899, has diminished the amount of the expenses by providing that the owner shall only pay half the poor rate, a less sum must be deducted for the purposes of the assessment than would have been deductible if that Act had not been passed.

Hon. Sir Malcolm Macnaghten K.C. in reply. The respondents are wrong in assuming that the hypothetical tenant is entitled to the benefit of the Act of 1899. The person who under s. 1 is entitled to that benefit is the "owner," and the hypothetical tenant is not an owner. By s. 2, sub-s. 1 (c), "the expression 'owner of tithe rentcharge' has the same

(1) (1883) 11 Q. B. D. 195, 200.

(2) (1858) E. B. & E. 1.

meaning as in the Tithe Act, 1891." By s. 9 of the Tithe Act, 1891 (54 & 55 Vict. c. 8), we are referred back for the meaning of "owner" to the Tithe Act, 1836, and by s. 12 of that Act: "The word 'tithe owner' . . . shall mean and include every person who shall be in the actual possession or receipt of the . . . tithes (except . . . any tenant for years whatsoever holding under a lease or agreement for a lease for a term which shall not have exceeded fourteen years from the commencement thereof)." The hypothetical tenant being a tenant from year to year clearly comes within that exception, and is therefore excluded from the definition of an owner of a tithe rentcharge. The rates which have to be deducted from the hypothetical rent are the rates which the hypothetical tenant would have to pay, and he would have to pay the whole of the rates.

[AVORY J. referred to s. 6 of the Tithe Act, 1891 (54 Vict. c. 8), which provides that "Any rate to which tithe rentcharge is subject shall be assessed on and may be recovered from the owner of the tithe rentcharge," as showing that rates on tithe rentcharge are not usual tenant's rates.]

"Usual tenant's rates" mean rates which the tenant usually pays. The fact that under a particular Act of Parliament the poor rate is not to be paid by the tenant but by the owner does not make the poor rate any the less a usual tenant's rate. The Assessment Committee have first to ascertain what a tenant would give if there were no rates at all. Then they must consider what the rates will be for the coming year, and they must assume that the tenant will pay those rates. That he does not in fact have to pay them is immaterial.

AVORY J. In this case I have the misfortune to differ from my Lord and my brother Horridge. In order to solve the question stated for the opinion of the Court we have to ascertain the rent at which the tithe rentcharge in question "might reasonably be expected to let from year to year free of all usual tenant's rates and taxes," that is to say the rent which a tenant would pay if he had to pay those rates and taxes. The owner of the tithe rentcharge has to be taken

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amount of the rates deducted for the purpose of arriving at the annual value, but he will not be entitled to have any deduction made in respect of rates at all. In the present case we are not called upon to decide that point. We are only asked to decide whether the Assessment Committee were right in deducting only half the rates. In my opinion they were. I cannot myself understand how, when in fact it is admitted that one-half of the rates to which the tithe rentcharge is subject is paid by the Crown, that half which is so paid by the Crown can be said to be a usual tenant's rate. The question of what deductions ought to be made from the gross rent of a tithe rentcharge for the purpose of getting at the rateable value was much discussed in *Hackney and Lamberhurst Tithe Commutation Rentcharges*.⁽¹⁾ Amongst other claims of deduction there considered was one in respect of land tax. Coleridge J. in delivering the judgment of the Court said: "The allowance cannot be made for it unless it be brought within the term 'usual tenant's rates and taxes.' . . . By statute 38 Geo. 3, c. 5, s. 17, the tenant is required and authorized to pay the sum rated upon the land, and to deduct out of the rent so much of the rate as in respect of the rent the landlord should and ought to pay and bear, and the landlords, both mediate and immediate, according to their respective interests, are required to allow such deductions on receipt of the residue of the rents. It has been held that a covenant that the tenant should pay the land tax is not unlawful; but, apart from any special agreement to the contrary, the tenant, though primarily charged, is allowed . . . by the Act to deduct it from the rent. Hence it is commonly considered a landlord's tax, and does not seem to fall within the words 'usual tenant's rates and taxes,' a form of expression in the statute seemingly introduced for the purpose of letting in other considerations than those of a strictly legal character. We do not think that this allowance ought to be made to the appellant." Now there is a case where admittedly the tax is payable in the first instance by the tenant, but he is allowed to deduct it. The Court held that such a tax is not a usual tenant's tax

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(1) E. B. & E. 1, 47.

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because it does not ultimately fall upon the tenant, and therefore it is not one of those taxes which have to be deducted for the purpose of arriving at the rateable value. It appears to me to follow from that that under the provisions of s. 6 of the Act of 1891 combined with the Act of 1899 at least one-half of the rates on the tithe rentcharge are not usual tenant's rates. For the reasons I have already given I much doubt whether any of the rates assessed on a tithe rentcharge are usual tenant's rates. I must say one word with respect to the cases which have been cited. I do not think my present judgment is in conflict with *Reg. v. Dodd*. (1) That was a case where the owner of weekly property had compounded for the rates under the terms of a statute which provided that if the owner agreed to pay the rates whether the houses were occupied or not he should only be called upon to pay half the rates, and the question was whether he was entitled to the same amount of deduction for rates and taxes as was allowed to occupiers in respect of property not compounded for. For the purpose of ascertaining the rateable value of any one of those houses it was necessary to assume a tenant of that particular house in occupation, and it is clear that such a tenant would have to pay the full rates, and accordingly the Court decided that the landlord was entitled to the same deduction that such a tenant would be entitled to. There was no question in that case such as is raised by s. 6 of the Act of 1891, which provides that the rates on a tithe rentcharge are not usual tenant's rates at all but owner's rates. The other case which was referred to—*Slade v. Bristol Overseers* (2)—appears to me to be in accordance with the view I have formed in this case, certainly not in conflict with it. For these reasons I think the Assessment Committee were right in refusing to deduct more than half the rates, though I also think that they might have been right if they had refused to deduct any at all.

HORRIDGE J. I regret that I cannot take the same view as my brother Avory. The question to be decided is whether,

(1) L. R. 1 Q. B. 16.

(2) 74 J. P. Newspaper, 629.

having regard to the provisions of the Tithe Rentcharge (Rates) Act, 1899, the Assessment Committee were right in saying that only one-half of the rates leviable in respect of this rentcharge ought to be deducted in arriving at its rateable value. That Act provides that "The owner of tithe rentcharge attached to a benefice shall be liable to pay only one-half of the amount of any rate to which this Act applies which is assessed on him as owner of that tithe rentcharge." It seems to me that that Act has nothing whatever to do with the assessment of the value. The intention was that the assessment should be made on precisely the same principle as it would have been if the Act had not been passed, but that when once the assessment had been made the owner was only to pay one-half of the rates which were based on that assessment. That I think is the meaning of the Act. But an argument has been addressed to us on the question as to what rent the hypothetical tenant of a tithe rentcharge would pay according to the provisions of the Parochial Assessments Act, 1836. Sir Malcolm Macnaghten says that as the hypothetical tenant under that Act must be a tenant from year to year he would not be entitled to the remission of half the rates, for the right to that remission is conferred by the Act of 1899 only upon the owner, and the owner of a tithe rentcharge is defined in the Tithe Act, 1836, in such terms as to exclude any person who was a tenant of the rentcharge for a term of less than fourteen years. I think that argument is sound, but I prefer to put my judgment on the ground that in my opinion the Act of 1899 has no reference to the assessment of the rateable value; it deals only with the relief from payment of a portion of the rates based upon an assessment arrived at in the ordinary way. Before dealing with the cases that have been cited I wish to refer to s. 6 of the Tithe Act, 1891, upon which my brother Avory has commented. That section provides that: "Any rate to which tithe rentcharge is subject shall be assessed on and may be recovered from the owner of the tithe rentcharge, in the like manner and by the like process as on and from any occupying ratepayer." That I understand to be merely a

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collecting section. Before that Act rates on tithe rentcharge could not be recovered from the owner of the rentcharge, they had to be levied on the occupier of the premises, and to my mind all that s. 6 provides is that when once you have got the rateable value of the rentcharge assessed you may assess the rates directly upon the owner and recover them from him. I do not think it has anything to do with the principle of assessing the rateable value. Now let us turn to *Reg. v. Dodd*.⁽¹⁾ First, it is to be observed that the Act under which that case arose contained a provision similar to s. 6 of the Tithe Act, 1891, namely a provision placing liability on the owner. In that case the appellants Dodd & Co. were the owners of two houses in the parish of Bilston let at 2s. 6d. a week, giving a rateable value of less than 6l. 10s. By a local Act the owners of houses of a less rateable value than 6l. 10s. were to be rated instead of the occupiers, and such owners were empowered to agree with the parish authorities that in consideration of their only being charged with half the rates they would pay whether the houses were occupied or not. The appellants entered into such an agreement. It appeared that the sum allowed to be deducted in Bilston for rates and taxes in respect of houses not within the said Act was one-fifth of the gross rental. The appellants claimed that they were entitled to the same deduction for rates and taxes as was allowed to occupiers of property not compounded for, that is to say one-fifth of the gross rental. The respondents claimed that as under the composition agreement they only paid half rates they were only entitled to a deduction of one-tenth. The Court held that the appellants were right. Cockburn C.J. said: "The Parochial Assessments Act is anterior to the local Act, and its enactments are quite irrespective of Acts allowing compositions. The Parochial Assessments Act points out what deductions shall be made in respect of the usual tenant's rates and taxes. That is a general enactment, and must apply to the case in which the landlord is put in the place of the tenant; and we must ascertain what are the usual tenant's rates and

(1) L. R. 1 Q. B. 16, 18.

taxes, independently of the local Act"—here I think you must ascertain what are the usual tenant's rates and taxes independently of the Tithe Rentcharge (Rates) Act, 1899. "The landlord, therefore, must be considered as standing in the place of the tenant, and he is entitled to the deduction in respect of what the tenant would be rated at, and not what he, the landlord, actually paid." It seems to me that every word of that judgment applies to the case before us. Then Blackburn J. said: "The rateable value is to be ascertained under the Parochial Assessments Act,"—that is what we have to do here—"and the local Act then says, if the landlord agrees to pay whether the house is empty or not, he shall only be required to pay half the sum assessed"—and here the Act of 1899 makes a similar provision. "That does not affect the deductions to be made in order to ascertain the rateable value; a different assessment is not to be made." In my view under this Act a different assessment of the rateable value is not to be made, but when the rates come to be paid upon the assessed value only half is to be paid by a beneficed clergyman. I wish to say one word with regard to the *Hackney and Lamberhurst Case*. (1) That case seems to me to decide nothing more than that a tenant who was going to take premises would not take into account the land tax which his landlord would have to pay, a proposition that can have no bearing upon the construction that we ought to put upon the Act of 1899. For these reasons I think that the decision of the Assessment Committee was wrong, and that the appeal ought to be allowed.

DARLING J. I have come to the same conclusion as my brother Horridge. The question which we have to decide is as to the effect of s. 1 of the Tithe Rentcharge (Rates) Act, 1899, upon the computation of the annual value of a tithe rentcharge for rating purposes. The words of the section are these. [He read the section.] Now the appellant in this case is the owner of a tithe rentcharge attached to a benefice. A rate has been assessed on him as owner, and

(1) E. B. & E. 1.

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but for this Act of Parliament he would have to pay it in full, for the whole of the rate has been assessed on him and no part of it has been assessed on anybody else. But although the whole rate has been assessed on him the Act provides that when it comes to payment he shall only be required to pay half of the amount so assessed, the other half being paid by the Commissioners of Inland Revenue. In consequence of that provision the Assessment Committee in computing the gross estimated rental of the tithe rentcharge have only allowed a deduction of half the rates. The appellant contends that notwithstanding that he is only to pay half the rates he is entitled to have the whole of them deducted. That depends on the Parochial Assessments Act, 1836. That Act, as read in the light of the Valuation (Metropolis) Act, 1869, provides that the gross estimated rental, which is the equivalent outside the metropolis to what is termed gross value in the metropolis, shall be the rent at which the premises might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes. When considering what rent the hypothetical tenant would give for the rentcharge one must look, not at what he will be ultimately called upon to pay, but at what he undertook to pay, for it is with reference to that undertaking that the hypothetical rent is fixed. The fact that when the rent is so fixed upon the terms of that undertaking a statute provides that the person liable to pay the rates shall in certain circumstances, that is to say where the tithe rentcharge happens to be attached to a benefice, be required to pay only half the rates which he undertook to pay is quite immaterial. It is as though a generous relative had come forward and discharged half his liability for him. The question which in this case is submitted for the opinion of the Court is whether the whole of the rates assessed on the tithe rentcharge ought to be deducted in order to arrive at the gross and rateable value, or whether only half the rates ought to be deducted. My brother Avory's view is that as by s. 6 of the Tithe Act, 1891, the rates on tithe rentcharge are to be assessed on the owner and not on the tenant,

the hypothetical tenant, when considering the rent which he could afford to pay, would not take the rates into account as he would not be liable to pay them; and although, as my brother says, it is not necessary to go so far, having regard to the terms of the question put to us, he does not shrink from going the full length of holding that the hypothetical tenant of a tithe rentcharge is not entitled to have any of the rates deducted at all. That is, I think, the only logical conclusion at which he could arrive if his view of the effect of s. 6 of the Act of 1891 is correct. But I take the same view of that section as my brother Horridge. I agree with him that the appeal must be allowed.

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Darling J.

Appeal allowed.

Solicitors for the appellant: *Wadeson & Malleson.*

Solicitors for the respondents: *Church Adams & Co., for E. J. Waugh, Haywards Heath.*

J. F. C.

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Criminal Law—Mens rea—House Pigeon—Shooting under the Belief that it is a wild One—"Unlawfully and wilfully kill"—Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 23.

By s. 23 of the Larceny Act, 1861: "Whosoever shall unlawfully and wilfully kill . . . any house dove or pigeon under such circumstances as shall not amount to larceny at common law" shall be liable to a penalty:—

Held, that to a charge under that section the belief of the defendant that the pigeon shot by him was a wild one which he might lawfully kill affords no defence.

CASE stated by justices of Herefordshire.

The respondent Gwynne was charged under s. 23 of the Larceny Act, 1861, with having killed a house pigeon the property of one William Pegg. The pigeon was a homing pigeon, and started with nine other pigeons to fly from Bournemouth to Leicester, and was the only one of the said pigeons which did not return to Leicester. It lost its way

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and was shot by the respondent whilst it sat on the ground in a field about two miles from the city of Hereford and at a distance of forty yards from the respondent. The respondent stated in answer to the charge that he thought the pigeon was a wild pigeon when he shot it.

The justices being satisfied that the respondent believed that the pigeon was a wild one and that he had a right to shoot it were of opinion that he did not unlawfully and wilfully kill it within the meaning of the section.

The prosecutor appealed.

Joy for the appellant. The justices ought to have convicted. A man "wilfully" kills a bird if he shoots it intending to kill that particular bird. A mens rea is not an essential ingredient of the offence. No doubt the section does not apply to a wild pigeon but only to such as are the subject of larceny at common law. But a person who shoots at a pigeon under the belief that it is a wild one takes the risk of its turning out to be a house pigeon. And the act of shooting a pigeon is "unlawful," unless there was some justification for it—for instance, where it is done for the purpose of protecting the shooter's crops, as in *Taylor v. Newman*. (1)

No counsel appeared for the respondent.

DARLING J. In this case the respondent was charged with having unlawfully and wilfully killed a pigeon contrary to s. 23 of the Larceny Act, 1861. It appears that he shot it while it was on the ground at some distance from him. He stated in Court, and the justices accepted his statement, that he thought it was a wild pigeon, but he never denied that he shot at it meaning to kill that particular bird. In those circumstances I think that his act was both wilful and unlawful. It was not accidental. It was not as if he had shot at a crow and killed a pigeon unintentionally. The pigeon was not his property, and it was not in fact a wild one. From a very early date house pigeons were specially protected by law, as being a valuable species of property. In

(1) (1863) 4 B. & S. 89.

my opinion s. 23 was intended to protect house pigeons against being killed, not only by persons who killed them knowing them to be house pigeons, but also by persons who did not know that. A person who shoots a pigeon which turns out to be a house pigeon must take the consequences of his act. The justices were wrong in the view which they took and the appeal must be allowed.

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AVORY J. I agree. The case of *Taylor v. Newman* (1) seems to me to support our view. There the appellant, a farmer, was prosecuted under the same section, and he set up as a defence that the complainant's pigeons were in the habit of feeding on his crops and that he shot the particular pigeon which was the subject of the charge whilst it was so engaged. The justices there convicted. On appeal the Court, after entertaining much doubt upon the matter, came to the conclusion that the fact of the appellant having shot the pigeon in defence of his crops was an answer to the charge. But for the fact that the appellant was there acting in defence of his own property the Court would have held that the mere act of killing a house pigeon was an offence if the defendant killed what he shot at.

HORRIDGE J. I agree.

Appeal allowed.

Solicitors for the appellant: *Murr & Vyvyan Hicks, for Sharpe, Darby & Millichip, West Bromwich.*

(1) (1863) 4 B. & S. 89.

J. F. C.

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HUMMERSTONE AND ANOTHER *v.* LEARY AND ANOTHER.

May 5, 10.

County Court—Parties—Joinder of two Defendants—Prima facie Case shown—One Defendant dismissed from Action at close of Plaintiffs' Case—Plaintiffs' Right to have Case against both Defendants tried—County Court Rules, 1903-1920, Order III., r. 5.

The plaintiffs, who were injured in a collision between a motor-lorry, in which they were passengers, and a motor-car, brought an action in the county court claiming damages, making the owners of both vehicles defendants under Order III., r. 5, of the County Court Rules. The plaintiffs' evidence appeared to make it probable that the driver of the car rather than the driver of the lorry was to blame, but they could do no more than state what they observed just before the collision occurred. Their evidence did not affirmatively or conclusively show that the driver of the lorry was not to blame. At the close of the plaintiffs' case counsel for the owner of the lorry submitted that there was no evidence against him, and the county court judge took this view and dismissed that defendant from the action. The case then proceeded against the other defendant, whose witnesses threw all the blame on the driver of the lorry, and the county court judge found that the driver of the car was not negligent and accordingly entered judgment for the second defendant:—

Held, that as a state of facts was proved by the plaintiffs from which the reasonable inference to be drawn was that prima facie one if not both of the defendants was negligent, the county court judge should not have dismissed the first defendant, the owner of the lorry, from the action at the close of the plaintiffs' case, but should have heard the case against both defendants before coming to a decision; and therefore that there must be a new trial.

APPEAL from Bow County Court.

The following statement of facts is, in substance, taken from the judgment: The plaintiffs sued to recover damages for personal injuries alleged to have been caused by the negligence of both or one of the two defendants whom they sued jointly and in the alternative. The two plaintiffs were passengers in a motor-lorry belonging to the first defendant Leary, and their case was that there was a collision in broad daylight between the lorry and a motor-car belonging to the second defendant Foster, that the driver of the car had endeavoured to pass the lorry in a narrow road, and that as a consequence of the collision the lorry overturned and the plaintiffs were thrown out and injured. Their evidence

appeared to make it probable that the driver of the car rather than the driver of the lorry was to blame, but the plaintiffs could not do more than state what they observed just before the lorry was upset. They did not affirmatively or conclusively prove that the defendant Leary was not liable. At the close of the plaintiffs' case counsel for Leary submitted that there was no evidence against his client and that judgment ought to be entered for him. Counsel for the plaintiffs submitted that there was a case which he was entitled to have tried as against both defendants, but the county court judge assented to the contention on behalf of Leary and he entered judgment for Leary. The case then proceeded against the second defendant Foster, who called the passengers on his car, who threw all the blame on Leary's driver. The county court judge, not hearing what Leary's witnesses had to say, as Leary had been dismissed from the action, found that Foster's driver was not negligent, and gave judgment accordingly. The plaintiffs therefore, who on Foster's evidence had proved negligence against Leary, and might on Leary's evidence have proved negligence against Foster, failed against both.

The plaintiffs appealed.

Harney K.C. and *Pike Glasgow* for the plaintiffs. The county court judge was wrong in dismissing the defendant Leary from the action at the close of the plaintiffs' case. Order III., r. 5, of the County Court Rules, which enables a plaintiff who is in doubt as to the person from whom he is entitled to redress to "join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties," clearly contemplates the case being heard out against both defendants. In *Lipman v. Fox and London General Omnibus Co.* (1) Lord Alverstone C.J. in similar circumstances refused to dismiss one defendant from the action, ruling that he must remain a party in order that it might be seen whether the evidence called for the other

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(1) (1911) Unreported. Noted in Annual Practice, 1921, vol. i., p. 229.

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defendant should fix him with liability. That ruling was clearly in accordance with the spirit of the rule.

McCall K.C. and *C. T. Williams* for the defendant Leary. The judge was right in the course he took. The same course was taken by Phillimore J. in *Stacey v. Gas Light and Coke Co.* (1) and by Ridley J. in *Lilly v. Tilling and London County Council.* (2) The language of Order III., r. 5, was not intended to get rid of the general principle that in an action for negligence the plaintiff must prove his case against the defendant. In this case the plaintiffs gave no evidence of negligence against Leary, and cannot now be heard to say that they made out a case against him after his dismissal from the action.

[They also referred to *Bullock v. London General Omnibus Co.* (3) and *Wing v. London General Omnibus Co.* (4)]

Shakespeare for the defendant Foster. Whether a county court judge should direct a nonsuit in such a case as this is not a matter of law, but a matter upon which he has to exercise his discretion in each particular case; and this Court will not interfere with the exercise of his discretion.

Harney K.C. replied.

May 10. The following judgment of the Court (Bray and Lush JJ.) was read by

BRAY J. This case raises a question of considerable importance. It is somewhat remarkable, considering that it so frequently arises, that it is almost devoid of authority. [His Lordship stated the facts and continued:] In our opinion the learned judge took an entirely wrong course in allowing Leary to be dismissed from the action. Instead of trying the case as one entire case, which it was, and hearing all the evidence before arriving at a conclusion, he divided it into what we may call compartments and tried each separately, the result of which was that it was never really tried at all. He treated it as a claim against Leary alone and a claim against Foster alone, overlooking the fact that the

(1) (1910) 9 L. G. R. 174.
(2) (1912) 57 Sol. J. 59.

(3) [1907] 1 K. B. 264.
(4) [1909] 2 K. B. 652.

plaintiffs, as they were entitled to do under the Rules, were alleging that either Leary or Foster or both were responsible for the accident. When once a state of facts was proved, as it was, from which the reasonable inference to be drawn was that *prima facie* one if not both drivers had been negligent, the plaintiffs were entitled to call on the defendants for an answer, and the proper time at which to decide whether on the evidence one defendant or the other defendant or both the defendants were liable was at the close of the whole case. That the plaintiffs did prove such a state of facts is clear. The collision took place in broad daylight, there was no other traffic in the road, and there was nothing to indicate inevitable accident. If the learned judge was right, then if all that the plaintiffs could have proved was the collision itself, which under such circumstances as these would raise a presumption of carelessness on the part of one or both drivers, each defendant would be entitled to judgment because the plaintiffs would have failed to prove which driver was to blame. The learned judge did not give effect to Order III., r. 5, of the County Court Rules, which is substantially a reproduction of R.S.C. Order XVI., r. 7. Order III., r. 5, which enables a plaintiff to join several defendants when he is in doubt which is liable, provides that "where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties." The language of that rule contemplates that the case shall be tried out between all the parties, and, apart from the special language of the rule, it is in our opinion clear that when the difficulty of procedure is got over and a plaintiff can present his case against two defendants in the alternative he is just as much entitled to have the case tried out where he has made a *prima facie* case in support of his cause of action as a plaintiff is who proceeds against one defendant alone.

It must not be supposed from our judgment that if a plaintiff fails to make a *prima facie* case at all he is entitled to call on two defendants under such circumstances as these to

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give evidence and ask for judgment if no such evidence is given. He must of course prove facts from which in the absence of an explanation liability could properly be inferred. It might perhaps happen that a plaintiff suing two defendants in the alternative proved affirmatively that as regards one of them it is impossible to impute blame to him, and in that case, if such a case should occur, the judge would no doubt be entitled to dismiss him from the action. But it is not enough to show that on the plaintiff's view of the matter from what he was able to see of the accident it seems probable that one defendant was to blame. It seemed probable here on the plaintiffs' evidence that Foster's driver was to blame. As the ultimate result showed, they did not conclusively prove it.

With regard to the authorities, Lord Alverstone C.J. appears to have taken the same view in *Lipman v. Fox and London General Omnibus Co.* (1), but there is no report of the judgment. There appears to be only a short comment on the case in a paragraph of the *Law Journal* for December 2, 1911. In *Stacey v. Gas Light and Coke Co.* (2) Phillimore J. seems to have allowed judgment to be entered for one defendant at the close of the plaintiff's case, but the case is not reported elsewhere, and the learned judge's reasons are not very fully given nor does the question appear to have been fully argued.

The judgment in favour of each defendant must be set aside and a new trial ordered. The defendant Leary must pay the plaintiffs' costs of the appeal, and the costs of the first trial must be in the discretion of the judge. We make no order as to costs with regard to Foster.

New trial ordered.

Solicitors for plaintiffs: *Lewis Barnes & Co.*

Solicitors for defendant Leary: *Philbrick & Co.*

Solicitor for defendant Foster: *F. J. Berryman.*

(1) Unreported. Cited in Annual
Practice, 1921, vol. i., p. 229.

(2) 9 L. G. R. 174.

HAMPTON v. WINWARD.

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April 21.

Employer and Workman—Minimum Wage—"Workman in agriculture"—
Milkmaid—Corn Production Act, 1917 (7 & 8 Geo. 5, c. 46), s. 4, sub-s. 1;
s. 17, sub-s. 1 (a) (c).

By s. 17, sub-s. 1, of the Corn Production Act, 1917, "For the purposes of this Act—(a) the expression 'agriculture' includes the use of land as grazing, meadow, or pasture land, or orchard, or osier land, or woodland, or for market gardens or nursery grounds, and the expression 'agricultural' shall be construed accordingly." By sub-s. 1 (c) "the expression 'workmen' includes . . . women":—

Held, that women employed at a farmhouse part time each day solely in milking cows were not "workmen in agriculture" within the meaning of s. 4, sub-s. 1, of the Act, and were not, therefore, within the provisions of the Act dealing with the payment of a minimum wage.

CASE stated by justices for the County of Chester.

On November 13, 1920, three informations were preferred by the appellant, Francis George Robert Hampton, against the respondent, Samuel Winward, for that he, between May 8, 1920, and July 10, 1920, being a person employing a workman in agriculture, to wit Mary Jane Mullock, did unlawfully fail to pay to Mullock wages at a rate not less than the minimum rate as fixed under the Corn Production Act, 1917. The two other informations charged similar offences with regard to the employment of Bertha Barnes and Elizabeth Biggs. By s. 17, sub-s. 1 (c), "workmen" includes women. At the hearing on December 6, 1920, the following facts were proved or admitted.

The three women were employed by the respondent at his farmhouse for part time each day solely for the purpose of milking cows belonging to the respondent. Each woman received as consideration for those services the sum of 12s. at the end of each week, which sum, on the assumption that Part II. (Minimum Wage) of the Act of 1917 and the relevant Orders applied to them, was wages at a rate less than the minimum rates applicable.

At the close of the appellant's case it was submitted that the women, being employed only to milk cows, were not workmen in agriculture within the meaning of s. 4, sub-s. 1,

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of the Act of 1917, and therefore not entitled to the minimum rates of wages prescribed thereunder.

The justices were of opinion that the employment of the women was not an employment in agriculture within the meaning of the Act, and dismissed the information, but stated this case.

Roland Oliver for the appellant. These women were "workmen in agriculture" within the meaning of s. 4, sub-s. 1, of the Corn Production Act, 1917, and the justices ought to have convicted the appellant. By s. 17, sub-s. 1: "For the purposes of this Act—(a) the expression 'agriculture' includes the use of land as grazing, meadow, or pasture land, or orchard, or osier land, or woodland, or for market gardens or nursery grounds, and the expression 'agricultural' shall be construed accordingly." It may be that these women do not come directly within these words, because it might be said that they did not use the land; but s. 17 is not a definition section properly so called, but assumes an ordinary meaning for agriculture to which it proceeds to add. It should be interpreted in the broadest possible manner, and it was intended to include therein the servants of professional farmers employed for the purposes of the business. "Agriculture" includes all the ordinary operations of farming involving the use of land, in this case as "pasture," for the cows fed thereon. A cow cannot use land without being milked, for otherwise it would die, and to have them milked is part of the business of the farmer.

In *Smith v. Coles* (1) a farm carpenter was held to be employed in agriculture within the meaning of s. 1 of the Workmen's Compensation Act, 1900 (63 & 64 Vict. c. 22), in which section "agriculture" included "the use of land for any purpose of husbandry." In *Ex parte Hughes* (2) a milkmaid was held to be a servant in husbandry, and would therefore be employed in agriculture within the Act of 1900. The observations of Collins M.R. in *Smith v. Coles* (3) are in

(1) [1905] 2 K. B. 827.

(2) (1854) 23 L. J. (M. C.) 138.

(3) [1905] 2 K. B. 827, 830.

favour of the appellant, for the milking of cows is ancillary to the keeping of cows.

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[LAWRENCE C.J. If these women are within the Act they will be entitled to overtime pay on Sundays, although only employed on that day in milking cows for a few hours.]

Powell K.C. and *Graham Mould* for respondent. In the ordinary meaning of the words these women were not workmen in agriculture; if they were, then a person engaged, for example, in clipping a horse would also be a workman in agriculture. The Act of 1917 was intended to apply to land, as appears from the preamble and s. 17. Land must be used for the achievement of the farmer's purpose—namely, the obtaining of milk, but the milking does not involve the use of land. Even if the milking had taken place in the meadow instead of at the house the contention would be the same.

[They were stopped.]

LAWRENCE C.J. In this case, which is stated in relation to the Corn Production Act, 1917, the question raised is whether these particular women were workmen in agriculture within the meaning of s. 4, sub-s. 1, of the Act. The case finds that they were employed at the farmhouse for part time each day solely for the purpose of milking cows belonging to the respondent. That was their sole employment, and took place at the farmhouse. There is no finding that they had anything whatever to do with the land or with the use of the land; the only connection they had with the land was that they milked the cows which, I suppose, grazed on the land. Therefore it seems to me that the question is whether they came within the words "workmen in agriculture," because they had that remote connection with agriculture. I have come to the conclusion that they did not. Mr. Oliver, in his very skilful argument on behalf of the appellant, endeavoured to persuade us to decide that these women were within the Act by asking us to adopt a liberal construction of the Act, and cited cases in which words relating to persons

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employed in husbandry had received a liberal construction. I am prepared to give a very liberal construction to any Act when the carrying out of its main purpose requires it, but I do not think a construction can be properly called a liberal construction unless it clearly furthers the true purpose of the enactment. This is an attempt to bring these women within the Act and so entitle them to a higher scale of wages—namely, the overtime scale. That is only another way of increasing the price of milk, which is a necessity for the community, and I am surprised that the attempt should be made to bring these cases within the purview of the Act by means of the definition clause. That clause does not really touch this particular class of servant, and it is only by an extension of it that Mr. Oliver for the appellant tries to make it applicable. [His Lordship read s. 17, sub-s. 1 (a).] That section seems to me to have the effect of making every person a workman in agriculture who does anything involving the use of land for that purpose, but it does not bring in any person who does nothing on the land, and I do not think the cases cited help Mr. Oliver's argument. The best case from his point of view was *Ex parte Hughes* (1), where the justices had held that a dairymaid was a servant in husbandry, and the Court held that on the evidence they were entitled so to find. Here the justices have found the contrary, and have not found that these women were workmen in agriculture. I think the appeal fails.

DARLING J. I am of the same opinion. In order that the appeal should succeed it was necessary for the appellant to satisfy us that a woman who comes to a farm for a short time in the morning and a short time in the evening to milk cows and does nothing else on the farm is a workman in agriculture within the meaning of s. 4, sub-s. 1, of the Corn Production Act, 1917. [His Lordship read the definition section, s. 17.] The meaning of "agriculture" is made to depend on the use of land or the use of something which

(1) 23 L. J. (M. C.) 138.

exists on or is appropriate to land, and the words are strictly limited to the direct use of land in a particular way—for example, growing osiers. But in the present case there was no direct use of the land; the direct act was the milking of cows. What the women did was very far from the using of land, and it is a stretch of language to say that they were using the land on which the cows fed, which perhaps they had never even seen. If a man grows hops on his land they will be taken to some kiln; could it be said that the kiln-keeper used the land? Or that a miller uses the land on which the corn that he grinds grew? If it came from Canada one would have to say that he was using the land in Canada. I do not think the Legislature intended that. I agree that the appeal fails.

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AVORY J. I agree that upon the special findings of fact in this case—namely, that these women were employed at the farmhouse solely for the purpose of milking cows for part time each day—that they were not workmen in agriculture within the meaning of s. 4, sub-s. 1, of the Act as extended by s. 17, sub-s. 1. The case of *Smith v. Coles* (1), cited for the appellant by Mr. Oliver with particular reference to the judgment of Romer L.J. (2), does not appear to me to be applicable to the present case, because it was decided under the amended definition of “workman” under the Workmen’s Compensation Act, 1900, extending it so as to include workmen in agriculture, and by s. 1, sub-s. 3, “The expression ‘agriculture’ includes . . . the use of land for any purpose of husbandry, inclusive of the keeping or breeding of live stock, poultry, or bees, and the growth of fruit and vegetables.” It is obvious that employment in agriculture had a much wider meaning in that Act than in the Act of 1917, and therefore the observations of Collins M.R. when he said (3), “I am far from saying that employment in work ancillary to agricultural operations is incapable of being classed as agricultural employment,” must be read as applying to the particular

(1) [1905] 2 K. B. 827.

(2) Ibid. 831.

(3) Ibid. 830.

1921 statute with which he was then dealing. They do not govern
 HAMPTON this case, and are at most an expression of opinion that the
 v. question might have to be decided.
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Appeal dismissed.

Solicitors for appellant : *C. O. Humphreys & Son.*

Solicitors for respondent : *Ellis & Fairbairn.*

W. L. L. B.

1921 BAKER v. JAMES BROTHERS AND SONS, LIMITED.
 March 22, 23.

Negligence—Master and Servant—Motor-car supplied for Use of Servant—Defect causing Injury to Servant—Defect known to Master—Servant's Knowledge—Servant's Right to recover Damages—Maxim "Volenti non fit injuria."

The plaintiff, a commercial traveller, was employed by the defendants, who were wholesale grocers. His duties were to travel round the district, show samples, take orders and deliver goods, and for that purpose he was supplied by the defendants with a motor-car, the starting gear of which was defective. He complained of this on several occasions to the defendants, who admitted that it was defective, but failed to remedy the defect. While the plaintiff was upon one of his journeys the car stopped, and in trying to restart it, he was severely injured. In an action brought by the plaintiff to recover damages in respect of personal injury resulting from the negligence of the defendants:—

Held, that the plaintiff, notwithstanding his knowledge of the defect in the starting gear, had never undertaken or consented to take upon himself the risks arising from continuing to use the car, that he had sustained the injury owing to the personal negligence of the defendants, and that, not having been guilty of contributory negligence, he was entitled to recover.

Griffiths v. London and St. Katharine Docks Co. (1884) 13 Q. B. D. 259 disapproved and not followed.

FURTHER consideration by McCardie J. of a case tried before him at Northampton Assizes.

The plaintiff, who was a commercial traveller, was employed by the defendants, wholesale grocers at Northampton. It was the plaintiff's duty to travel round, show samples, take orders and deliver goods, and for this purpose he was supplied by the defendants with a motor-car. He found

that the starting gear of the car was defective, and complained on several occasions to the defendants, who admitted that the car was defective, but failed to remedy the defect. While upon one of his journeys the motor-car stopped, and, in trying to restart it, the plaintiff sustained a severe injury.

The action was brought to recover damages for personal injury and loss resulting from the negligence of the defendants.

The facts are fully set out in the judgment of McCardie J.

W. N. Birkett for the defendants. The plaintiff knew of the defect in the starting gear of the car, and with that knowledge continued to use the car. In these circumstances he is not entitled to recover : *Griffiths v. London and St. Katharine Docks Co.* (1) In that case it was held that in an action of this description the statement of claim must allege, not only that the master knew of the danger, but also that the servant was ignorant of it. That decision has never been questioned, though in several cases the Courts have held that it did not apply. Thus in *Abbott v. Isham* (2) Horridge J. held that the doctrine of *Griffiths' Case* (1) does not apply where the plaintiff establishes personal negligence on the part of the master in failing to provide proper premises or appliances, and where it is negligence on his part not to see that the premises or appliances are reasonably fit, but the facts of that case were very different from those of the present. In *Cole v. De Trafford* (3) the plaintiff claimed damages for personal injuries sustained by him through the negligence of the defendant, and Pickford L.J., in the course of his judgment, said : " I think the master's obligation may be expressed in this way. It is an obligation not by his own personal negligence to expose the servant to danger, and what is personal negligence of the master must depend upon the facts of the particular case." The Court there held that there was no evidence of personal negligence in the defendant.

(1) 13 Q. B. D. 259.

(2) (1920) 90 L. J. (K. B.) 309.

(3) [1918] 2 K. B. 523, 527.

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Upon the facts proved in the present case the plaintiff is not entitled to recover.

[He also referred to *Toronto Power Co. v. Paskwan*. (1)]

Bernard Campion for the plaintiff. The case of *Griffiths v. London and St. Katharine Docks Co.* (2) is no longer law. Although it has not been expressly overruled, the same result has been reached by a series of cases in which it has been distinguished. The decision has two branches, and each branch has in effect been dissented from. In *Williams v. Birmingham Battery and Metal Co.* (3) it was held that although the deceased knew of the danger which caused his death, the defendants were liable in the absence of any finding by the jury that he had agreed to undertake the risk. Again, in *Smith v. Baker* (4) it was held that the mere fact that the plaintiff continued in the defendant's employment with full knowledge of the danger which caused his accident did not preclude him from recovering. Those decisions are quite inconsistent with one branch of *Griffiths' Case*. (2) The most recent case in which that decision has been distinguished is *Monaghan v. Rhodes & Son*. (5) In that case, although the plaintiff must have known that he was incurring danger by using a rope ladder in the place of the iron hold ladders of the ship, which were blocked with cargo, it was held that when once the safe mode of access had gone, and another one of obvious danger had been substituted, and the defendants, the plaintiff's employers, had seen the dangerous substitute, and had not interfered, it followed that they were negligent, and were liable to the plaintiff for the accident which occurred. That decision applies to the present case and shows that the plaintiff, although he knew of the danger, is nevertheless entitled to recover.

Cur. adv. vult.

March 23. McCARDIE J. read the following judgment.

This action is brought by the plaintiff to recover damages

(1) [1915] A. C. 734.

(3) [1899] 2 Q. B. 338.

(2) 13 Q. B. D. 259.

(4) [1891] A. C. 325.

(5) [1920] 1 K. B. 487.

for personal injury and loss resulting from the negligence of the defendants who were his employers. The material facts, as I find them, can be briefly stated. The defendants (a private limited company) are wholesale grocers at Northampton. The plaintiff was in their employ for over twenty years as a commercial traveller. The defendants supplied various dealers in and about Northampton with groceries. It was the plaintiff's duty to travel around, to show samples, take orders, and deliver goods. For this purpose he was supplied with a motor-car. The car in question was a 2-seater Calcott. He first began to use it regularly in March, 1920. He found that the starting gear was defective. He complained to Mr. T. James and Mr. J. James, who were the two managing directors and also the directors and principal shareholders of the defendant company. He also complained to Bates, who was a mechanic employed by the defendants to keep in order the cars and lorries used in the defendants' business. The defect was not remedied. On April 12, 1920, he again complained to Mr. T. James, who admitted that the car was defective and who referred him to Bates. The plaintiff saw Bates, who said that he was overworked, that all the cars needed overhauling, and that the plaintiff must do the best he could with the Calcott car. The defect remained. The plaintiff again complained to the two managing directors, but nothing was done to remedy the fault.

On April 19, 1920, the plaintiff again saw both the managing directors and told them that the defect still existed. Mr. T. James told the plaintiff that he was a nuisance. The plaintiff replied that if he was laid up by personal injury he would be an expense to the defendants. Mr. James replied: "Well, we do not want you to be laid up. Use the car this week, as no other car is available. I will then have it seen to when you get back and you can go your next round by rail." So the plaintiff started on his journey in the Calcott car with the starting gear still defective. Some distance out the car stopped dead. The plaintiff tried to restart it. He kept turning the handle for five minutes but no spark came. The handle was low. The clearance was small. As the plaintiff

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was vainly endeavouring to start the car he twisted an abdominal muscle and suffered a severe abdominal strain. He became ill. He got home, was in bed for a month, saw several doctors, and it is clear that he has suffered from serious neurasthenia consequent on the accident. He was not able to return to his employment. The defendants paid him no salary during his illness, and in July, 1920, they terminated his employment. It is clear that the starting gear of the car was seriously defective. The defendants knew that fact perfectly well. I am satisfied that the defendants were guilty of negligence in not causing the defect to be remedied and in causing or allowing the plaintiff to use the defective vehicle. I hold that the defendant company, the two managing directors, and Bates were alike guilty of negligence. The serious injury to the plaintiff resulted from that negligence. Prima facie therefore I think that he is entitled to substantial damages. I accept without hesitation the evidence of the plaintiff. He was a most frank and truthful witness.

Mr. Birkett, however, contends that the defendants are entitled to judgment on the ground that the plaintiff with knowledge of the defect continued to use the car. That the plaintiff had that knowledge is clear. Hence Mr. Birkett relies on *Griffiths v. The London and St. Katharine Docks Co.* (1)

This decision has led to much confusion and ever-recurring doubt. The real question before me is whether it is still good law. If yes, the plaintiff will fail. If no, the plaintiff succeeds.

What then did *Griffiths' Case* (1) decide? The headnote is clear. It correctly states the effect of the judgments. It is this: "In an action of negligence brought by a servant against his master for personal injury resulting from the unsafe state of the premises upon which the servant was employed, the statement of claim must allege not only that the master knew, but that the servant was ignorant of the danger."

In the course of his judgment Brett M.R. said: "Now

(1) 13 Q. B. D. 259, 260, 261.

where it is an action by a servant against his master for the wrongful condition of machinery on the premises on which the servant is to act, or of the condition of the means by which the services of the servant are to be fulfilled, if the servant confines the allegations in his statement of claim to alleging the existence of danger in any of these things, owing to the negligence of the master, he shows no cause of action. That was decided many years ago by *Priestley v. Fowler*. (1) If the danger is one which was known to the master and not to the servant, the knowledge of the master and the want of knowledge of the servant make together a cause of action, and as it is necessary that these two things should exist in order to form a *prima facie* cause of action, it is necessary that they should be shown to exist in the statement of claim." So too Bowen L.J. said: "The old form of declaration used to show that the danger which caused the accident was known to the master and unknown to the servant. Both these allegations are material, because without them there is no cause of action." So too Fry L.J. said: "It appears to me to be plain that the knowledge of the master and the ignorance of the servant are necessary to form the cause of action."

These are strong opinions. They were given by distinguished judges. Are they still binding? In my opinion the answer is No. I think that the judgments in *Griffiths' Case* (2) are inconsistent with both earlier and later cases and that they conflict with the actual decisions of the House of Lords. It will be found, I believe, that *Griffiths' Case* (2) has never been cited with direct approval. It has been mentioned in order to be distinguished. It has become an anomaly rather than an authority.

Three decisions were cited by Brett M.R. in support of his view. The first was *Priestley v. Fowler*. (1) I venture most respectfully to think that this decision was not relevant. It did not purport to deal with the personal negligence of the master. It dealt with the negligence of a fellow-servant. *Priestley v. Fowler* (1) is the originating decision on the

(1) (1837) 3 M. & W. 1.

(2) 13 Q. B. D. 259, 260, 261.

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doctrine of common employment: see Sir Frederick Pollock's lucid work on Torts, 11th ed., p. 100. The other decisions cited by Brett M.R. were *Watling v. Oastler* (1) and *Williams v. Clough*. (2) These two decisions tended to show that knowledge by a servant of the defect would preclude him from recovering. It is clear however that these two cases are now wholly inconsistent with the decision of the House of Lords in *Smith v. Baker*. (3) I deal with this point later.

It is essential, in order to avoid confusion, to distinguish cases of common employment—i.e., where one servant of a master negligently causes injury to another servant—from cases where the master is charged with his own negligence—as, e.g., where he fails to provide proper and suitable plant: see *Williams v. Birmingham Battery and Metal Co.* (4); or fails to select proper and competent servants: see *Bartonshill Coal Co. v. Reid* (5); or is otherwise himself personally guilty of negligent conduct.

Bearing this in mind I feel that the best way to test *Griffiths' Case* (6) is to observe that upon the facts there stated the Court laid down two distinct things in their proposition as being essential to success by the plaintiff: (1.) Proof that the master knew of the danger; (2.) proof that the servant was ignorant of the danger. In my humble opinion both these branches of the proposition are erroneous. If so, *Griffiths' Case* (6) cannot be an authority on any point. I take the two heads separately.

First, I do not think it was ever essential nor is it now essential to show that the master had actual knowledge of the danger or defect. The action against the master by a servant for negligence was based, as it purported to be based, on negligence and not on knowledge. It may well be that negligence could not in certain cases be shown without proof of knowledge. It may also be that once knowledge was shown the inference of negligence would be drawn. But proof of knowledge was only a useful method of proving:

(1) (1871) L. R. 6 Ex. 73.

(2) (1858) 3 H. & N. 258.

(3) [1891] A. C. 325.

(4) [1899] 2 Q. B. 338.

(5) (1858) 3 Macq. 266.

(6) 13 Q. B. D. 259.

negligence. Negligence could exist and can exist without actual knowledge by the master of the danger or defect. Indeed the absence of knowledge may itself be the basis of the charge of negligence.

The relationship between master and servant normally places upon the master the duty of care towards his servant. He falls within the broad sphere of duty indicated by *Heaven v. Pender* (1) and similar cases. His duty can scarcely be less than that of a stranger. It may indeed be greater.

Now what does the duty of care involve? The answer is supplied by the well-known words of Alderson B. in *Blyth v. Birmingham Waterworks Co.* (2) where he defines negligence as "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." Subject to the observations in *Le Lievre v. Gould* (3) the words of Alderson B. are still a useful guiding rule.

It follows therefore that a master may be liable for a danger or defect (causing hurt to his servant) not only where he knew but where he ought to have known of it. The negligence may be either (a) where he knows and negligently fails to remedy, or (b) where he ought to have known but negligently fails in acquiring knowledge and therefore negligently fails to remove the danger or defect. This view, I think, is amply supported by authority.

Thus in *Webb v. Rennie* (4) it was held by Cockburn C.J. that an employer was liable, because he failed to have a defective scaffold pole inspected. So, too, in *Murphy v. Phillips* (5) an employer was held liable for not having a defective chain periodically inspected, although it was found that he had no actual knowledge of the defect.

In *Paterson v. Wallace* (6) Lord Cranworth said (after pointing out that Scotch and English law were alike on the point): "It is the master's duty to be careful that his servant

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(1) (1883) 11 Q. B. D. 503.

(2) (1856) 11 Ex. 781, 784.

(3) [1893] 1 Q. B. 491.

(4) (1865) 4 F. & F. 608.

(5) (1876) 35 L. T. 477.

(6) (1854) 1 Macq. 748, 751.

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is not induced to work under a notion that tackle or machinery is staunch and secure when in fact the master knows, or *ought to know*, that it is not so. And if from any negligence in this respect damage arise, the master is responsible." This observation is, I conceive, an illustration of the broad rule laid down in *Mersey Docks Trustees v. Gibbs*. (1)

In *Lloyd v. Woolland Bros.* (2) Bruce J., after referring to the criticism on *Griffiths' Case* in Clerk and Lindsell on Torts (see 6th ed., p. 100), clearly thought that it was not essential for the servant to aver the knowledge of the master.

He thus adopted the words of Lord Watson in *Smith v. Baker* (3) who said: "At common law his ignorance (i.e., the master's) would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect."

In *Cole v. De Trafford* (4) the view of the Court of Appeal was clearly against the view of the Court in *Griffiths' Case*. (5) Thus Pickford L.J. said: "I quite agree with the form of statement of the duty (i.e., of the master) by the learned judges in the Divisional Court—i.e., to take reasonable care to maintain the premises free from any concealed danger of which she was aware or ought to have been aware; but in order to apply it to any particular case the expression 'ought to have been aware' must be explained, and after explanation it seems to me to mean 'would have known' but for the failure to exercise reasonable care and skill, i.e., but for negligence."

Bankes L.J. apparently accepted the same principle.

So too Scrutton L.J. said: "He (the plaintiff) must show that the master did not take reasonable care to remedy the defect, either because he knew of it and did nothing, or because he *ought* to have known of it and so was negligently ignorant." See too per Horridge J. in *Abbott v. Isham*. (6)

I come to the conclusion upon the authorities that the

(1) (1864) L. R. 1 H. L. 93.

(2) (1902) 87 L. T. 73.

(3) [1891] A. C. 325, 356.

(4) [1918] 2 K. B. 523, 528, 537.

(5) 13 Q. B. D. 259.

(6) 90 L. J. (K. B.) 309.

first branch of the proposition in *Griffiths' Case* (1) is not now law. A servant need not aver the actual knowledge of the danger or defect by his master. It suffices to allege that he knew or ought to have known.

I also think that the second branch of the proposition in *Griffiths' Case* (1) is to be treated as erroneous at the present day. It is, I feel, opposed to principle to say that because a servant knows of the defect or danger he is therefore debarred from damages for injury through his master's negligence. To so suggest seems to me to transpose the maxim, "*Volenti non fit injuria*," which is sound doctrine, into a wholly different maxim, namely, "*Scienti non fit injuria*": see the cogent observations in Pollock on Torts, 11th ed., p. 166, and Salmond on Torts, 5th ed., p. 57.

This was clearly pointed out by Lord Esher himself in *Yarmouth v. France* (2) when he said: "The maxim, be it observed, is not '*Scienti non fit injuria*,' but '*Volenti*.'"

The matter is now beyond argument, for in *Smith v. Baker* (3) the House of Lords held that knowledge of a danger or defect is evidence, but only evidence, of an agreement by a servant to take the risk upon himself. It does not of itself debar him from remedy. The question is ever one of fact — namely, whether the plaintiff has voluntarily undertaken and contracted to accept the risk for himself.

An observation by Lord, Herschell is worthy of quotation here: "If, then, the employer thus fails in his duty towards the employed, I do not think that because he does not straightway refuse to continue his service, it is true to say that he is willing that his employer should thus act towards him. I believe it would be contrary to fact to assert that he either invited or assented to the act or default which he complains of as a wrong."

The principle thus laid down in *Smith v. Baker* (3) was emphatically applied by the Court of Appeal in *Williams v.*

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(1) 13 Q. B. D. 259.

(2) (1887) 19 Q. B. D. 647, 657.

(3) [1891] A. C. 325, 362.

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I venture to agree however with the useful observations of Sir John Salmond in his work on Torts, 5th ed., p. 58, when he says: "Knowledge of the danger, even if it does not prove an agreement to take the risk within the rule in *Smith v. Baker* (3) may nevertheless be a bar to the plaintiff's action for two other reasons: (a) It may negative the existence of any negligence on the part of the defendant in causing that danger; (b) it may establish the existence of contributory negligence on the part of the plaintiff."

For the reasons I have ventured to give (and without citation of other decisions) I come to the conclusion that *Griffiths v. London and St. Katharine Docks Co.* (4) is fundamentally inconsistent with other and binding judgments. It conflicts with established principles and is, I think, destitute of validity at the present day. In my humble view it cannot now be quoted as an authority. It is merely a case of historical interest. I feel sure that it would be far from the wish of the great judges who decided *Griffiths' Case* (4) that a decision should, from mere respect to their high distinction, be distinguished on purely artificial and inaccurate grounds, when apart from the greatness of their names it would be definitely rejected as an authority.

Upon the facts of the present case I find for the plaintiff. He has suffered damage through the personal negligence of the defendants. The default of the two managing directors (who are also the directors and principal shareholders of the defendant company) must be regarded as the personal default of the defendant company: see e.g. *Lennards Carrying Co. v. Asiatic Petroleum Co.* (5)

It is clear, and I so hold, that the plaintiff never undertook or consented to take upon himself the risks caused by the defective car or the defendants' negligence. It is also clear,

(1) [1899] 2 Q. B. 338.

(3) [1891] A. C. 325.

(2) [1920] 1 K. B. 487, 498, 499.

(4) 13 Q. B. D. 259.

(5) [1915] A. C. 705.

and I so hold, that the plaintiff was not guilty of contributory negligence. The damages are substantial. I have carefully considered the details. I assess the amount at 400*l*.

I therefore give judgment for that sum with costs.

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Judgment accordingly.

Solicitors for plaintiff: *Phipps & Troup, Northampton.*

Solicitors for defendants: *J. D. Douglas, Northampton.*

F. F. C.

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Jan. 20, 21;
March 14.

[1920. B. 4659.]

Landlord and Tenant—Closing Order—Effect on Tenancy—Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 32, 33—Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 10—Housing, Town Planning, &c., Act., 1909 (9 Edw. 7, c. 44), ss. 17, 18, 75—Housing, Town Planning, &c., Act, 1919 (9 & 10 Geo. 5, c. 35), ss. 32, 35.

A cottage belonging to the plaintiff had been for some years in the occupation of the defendant as a weekly tenant at a rent of 13*s.* a week, the landlord paying rates and taxes. The cottage was in a bad state of repair and the local authority on June 17, 1919, made a closing order under s. 17, sub-s. 2, of the Housing, Town Planning, &c., Act, 1909. Notice of the closing order was given to the defendant as the occupying tenant, but he refused to go out of occupation. The local authority then applied to the justices under the Small Tenements Recovery Act, 1838, for an order for the possession of the house and a warrant of ejectment was issued on December 1, 1919. The defendant applied to the local authority for time and agreed to give up possession on January 31, 1920. He, however, did not give up possession on that date and ultimately a second warrant of ejectment was issued which was executed by the police on May 11, 1920, the defendant's furniture being removed from the house. The plaintiff then expended 400*l.* in repairs and alterations to the house. In October, 1920, before the repairs were completed, the defendant, who had not paid any rent since he went out of occupation, by some means gained entrance to the house and retook possession of it. The plaintiff claimed to recover possession of the house and damages:—

Held, that the defendant's tenancy of the cottage was not subsisting in October, 1920, and that he had no legal right to retake possession of the house. The defendant was under a statutory duty to obey the

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terms of the closing order by going out and remaining out of the premises. He had committed a breach of that duty and the plaintiff was entitled to an order for possession and to damages.

ACTION tried before Acton J.

The action was brought by the plaintiff against the defendant to recover possession of a cottage at Hampton Wick and also damages.

The following statement of facts is taken from the judgment :—

“ The plaintiff was the owner of the freehold of a messuage or tenement, garden and premises situate in the Lower Road, Hampton Wick, and known as River Cottage, which was conveyed to him by a conveyance dated June 6, 1919, made between one Edward William James Wright as vendor and the plaintiff as purchaser. The plaintiff gave evidence that he had theretofore been mortgagee of the property, and that when it was conveyed to him it was in a very bad state of repair. Under the Housing, Town Planning, &c., Act, 1909, Part I., s. 17, sub-s. 2, the Urban District Council of Hampton Wick made a closing order, dated June 17, 1919, addressed to Mr. Wright, and this was served on the plaintiff through Wright, his predecessor in title.

“ The house was and had for some years been in the occupation of the defendant on a weekly tenancy at a rent of 13s. a week, the landlord paying the rates, except the water rate. Notice dated July 4, 1919, of the making of the closing order and that it had become operative was given to the defendant as occupying tenant. From July 4, 1919, the plaintiff endeavoured to get possession of the premises from the defendant in order to put them in repair, but the defendant would not go out of occupation.

“ Accordingly notice dated November 7, 1919, of the local authorities' intention to apply to the justices for possession of the house under the Small Tenements Recovery Act, 1838, was given to the defendant as occupying tenant, pursuant to the Housing, Town Planning, &c., Act, 1909, Part I., s. 17, sub-s. 4. On November 24, 1919,

application pursuant to this notice was made and the justices issued a warrant of ejectment dated December 1, 1919. The defendant, through his son, applied for some indulgence in the matter of time and the local authority agreed to this. By a letter dated December 15, 1919, addressed by the defendant to the local authority the defendant, in consideration of their agreeing to refrain from enforcing the ejectment order and allowing him till January 31, 1920, to go out, undertook to give up possession on or before that date. When January 31 came the defendant did not, however, go out, but remained in possession.

"A second notice dated March 16, 1920, was thereupon given to the defendant, and on April 12, 1920, application was again made to the justices and a second warrant of ejectment dated April 12, 1920, was issued by them. The defendant still remained in possession, and on May 11, 1920, the warrant of ejectment was executed by Police-Sergeant William Kind, Warrant Officer to the justices of Spelthorne Petty Sessions, who, with assistance, removed the defendant's furniture from the house, the defendant and his family leaving the house at the same time. Evidence was given by Kind, which I accept, that the defendant had told him when the warrant was executed that he had no key, and that the defendant handed over no key but said that the key was broken. It was suggested for the defendant that he had in fact retained the key, but there was no evidence of this and not even a suggestion that it was with the knowledge or consent of the plaintiff that the defendant retained possession of the key. The Warrant Officer then fastened the windows and secured the doors and left the premises so that they could not be entered except by breaking in.

"It appeared in the evidence that in May, 1919 (when the closing order was imminent), an allowance of 4*l.* from the rent amounting to 14*l.* 4*s.* then due from the defendant was made for the expenses of his removal from River Cottage. This was an amount fixed or suggested by the local authority and allowed accordingly to the

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defendant as occupying tenant, pursuant to the Housing, Town Planning, &c., Act, 1909, s. 17, sub-s. 5.

"From May 11, 1920, until about October 19, 1920, the defendant was out of occupation of River Cottage and no rent was ever paid or tendered by him, nor was anything whatever done, or written, or said by the defendant to the plaintiff to indicate that he regarded himself as, or contended that he was, still tenant of River Cottage. In the interval between the dates mentioned the plaintiff had possession of the house and expended some 400*l.* in repairs and alterations to the house which remained unoccupied. The repairs and alterations were not completed in October, 1920, and there was then and still is a bath to be put into the house, the cost of which will be about 70*l.*

"When the repairs were nearing completion the plaintiff entered into negotiations with a Mr. Sleigh for a lease of the house to him for a term of seven years at a rental of 75*l.* per annum, the tenant to pay rates and taxes; and these terms were ultimately in October, 1920, agreed upon between the plaintiff and Mr. Sleigh, a draft lease being signed on October 19, 1920.

"At this juncture some correspondence took place between the defendant's daughter and the plaintiff's agents. On October 10, 1920, the defendant's daughter wrote: 'Dear Sir, Having been directed by the Borough Surveyor, Mr. Taylor, I am taking this liberty of writing to you regarding the re-establishment of my parents, who were previously the tenants of River Cottage, to the aforementioned house. I think we are fully justified in making this application, especially considering the conditions under which we were evicted. Since, we have all been separated, not having been able to procure a house, having made many applications to Hampton Wick Council to find us a shelter, which they term impossible. We have applied to neighbouring boroughs, and they informed us that they could only cater for their own people. The furniture at the present time is rotting away in a stable at Hampton Wick. Having been informed that River Cottage has

been completed and fit for habitation again we respectfully beg to ask you to give this application full consideration. We shall be pleased if you will write us and state any terms which you may require. Trusting we may receive a favourable reply regarding same. Waiting in anticipation, Yours faithfully, L. Smith.' To that the answer was on October 12: 'We duly received yours of the 10th inst. asking on behalf of your parents that we should again accept them as tenants of this house. I am sorry to say that you are rather late in your application as we have already made arrangements for the house to be let, and the new tenant will shortly be in occupation.'

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"On October 19, 1920, Sleigh went to Hampton Wick but was unable to get into the house. The plaintiff was sent for and went also to the house where he found Sleigh, but though they tried to effect an entrance with the key provided by the plaintiff's agents to Mr. Sleigh they were unable to do so. It then appeared that the defendant had at some time before the arrival of Sleigh and the plaintiff by some means gained entrance to the house and his wife was then in the house and in occupation of it. The house had been fastened up so that it could not be entered save by force and the defendant's wife, when called upon to admit the plaintiff, would not comply, but maintained a hostile and threatening attitude and kept the house still fastened up against him. Seeing that they could not effect an entrance without a breach of the peace the plaintiff and Sleigh withdrew leaving the defendant's wife in occupation.

"On October 21, 1920, the defendant's wife addressed to the plaintiff's agents a letter in the following terms: 'Dear Sirs, Enclosed please find p.o. value 19/6, being in payment of one week's rent from Monday 18th October for above house. A receipt will oblige.' There was no evidence as to how the 19s. 6d. was arrived at, but the suggestion of the defendant's counsel was that it represented an attempt to arrive at the maximum rent which would have been payable under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, if the defendant's original

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tenancy was still in existence, and this probably was what was intended. Correspondence then ensued and more negotiations, but this proved fruitless, and ultimately, on November 30, 1920, this action was commenced."

G. W. H. Jones for the plaintiff.

Croom-Johnson for the defendant.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

March 14. ACTON J. read a judgment in which he stated the facts set out above and continued. It was agreed between counsel on either side that this case should be dealt with on the assumption that there was no breach of contract to repair and no default of any kind as to repairs on the part of the landlord.

It was contended for the plaintiff that the closing order made it an offence for any person to occupy the house as a dwelling, and that the tenancy of the defendant was at an end as the result of the making of the closing order, and the subsequent eviction thereunder of the defendant; that the defendant in resuming possession in 1920 was a mere trespasser whose possession was unlawful, and that the plaintiff as the freeholder had a right to possession against any one who could not show a better title.

For the defendant it was contended that he was still, and continuously had been, the lawful tenant of the premises in question; that the tenancy had not been determined by the notice to quit, and that it was not determined by the making of the closing order or by the service on the defendant of notice thereof, or by the eviction of the defendant thereunder, and that the defendant was protected by the Increase of Rent, &c. (Restrictions), Act, 1920.

With regard to the making of closing orders and the procedure thereunder the following statutes were cited and discussed: The Housing of the Working Classes Acts, 1890, ss. 32 and 33 (repealed by the Act of 1909 mentioned below),

and 1903, s. 10; The Housing, Town Planning, &c., Acts, 1909, ss. 17 and 18, and 1919, ss. 32 and 35. It is certainly a curious feature of this legislation that it nowhere deals in terms with the effect of a closing order, or of proceedings taken thereunder in compliance with the statutory provisions, upon a tenancy such as there was in the present case or any tenancy. What does emerge is that the object of all this legislation is to confer wide powers on local authorities to close and, in certain events, demolish houses unfit for human habitation. Originally by s. 32, sub-s. 3, of the Act of 1890 the occupying tenant when served with notice of the closing order was under a statutory obligation to obey the order and in conformity therewith cease to inhabit the dwelling house subject to a penalty not exceeding 20s. a day during his disobedience of the order. Under s. 10 of the Act of 1903 "where default is made as respects any dwelling house in obeying a closing order in the manner provided by sub-s. 3 of s. 32 of the principal Act, possession of the house may be obtained (without prejudice to the enforcement of any penalty under that provision), whatever may be the value or rent of the house, by or on behalf of the owner or local authority, either under ss. 138 to 145 of the County Courts Act, 1888, or under the Small Tenements Recovery Act, 1838, as in the cases therein provided for, and in either case may be obtained as if the owner or local authority were the landlord." The provisions of the Small Tenements Recovery Act, 1838, s. 1, which was the section under which proceedings were taken in the present case, are that where the interest of a tenant of any house, &c., shall have ended by legal notice to quit or otherwise and such tenant shall neglect to quit and deliver up possession the landlord, or his agent, may cause the person so neglecting or refusing to quit to be served with notice of his intention to apply to the justices at the expiration of seven clear days from the service of the notice to recover possession under the Act, and it is provided that two justices on proof of the holding and of the determination of the tenancy with the time or manner thereof, and of the right

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of the landlord where his title has accrued since the premises were let, and of the service of the notice, and the occupier's neglect or refusal, may issue a warrant in the form there set out for giving possession within a period to be therein named, not less than 21 or more than 30 clear days from the date of the warrant. By s. 17, sub-s. 4, of the Act of 1909 (by s. 75 of which ss. 32 and 33 of the Act of 1890 were repealed), it is provided that "where a closing order has become operative, the local authority shall serve notice of the order on every occupying tenant of the dwelling house in respect of which the order is made, and, within such period as is specified in the notice, not being less than 14 days after the service of the notice, the order shall be obeyed by him, and he and his family shall cease to inhabit the dwelling house, and in default he shall be liable on summary conviction to be ordered to quit the dwelling house within such time as may be specified in the order." Attention was drawn to the fact that s. 17, sub-s. 5, of the Act of 1909 provides for the local authority, except in certain contingencies, making to the tenant a reasonable allowance on account of his expenses in removing, but that there is no provision whatever for any such allowance on account of any subsequent expense of any kind. In other words the Legislature seems to have dealt with the expense incurred by the tenant in going out but not in any way with the possibility of expenses to be incurred in coming back. It was further pointed out that by s. 17, sub-s. 3, of the same Act a right of appeal to the Local Government Board against the closing order is given to the owner, while the sub-section is silent as to the tenant, and considerable stress was laid upon the fact that s. 18 of the same Act does not confer upon the local authority the power to compel the owner to do repairs or make his house fit for human habitation, or to penalise him for not doing so, but merely confers upon the local authority the power if he omits to do so to order its demolition without any sort of reference to the position or rights of a tenant in the event of such order being made and executed. Finally reference was made to

s. 32 of the 1919 Act which deals with the liability of an owner to a penalty on reletting a house ordered to be closed, and to s. 35 which enacts that the provisions of the Housing Acts are not to be affected by the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, or the enactments amending that Act.

It is no doubt somewhat strange that there should be no indication anywhere in this lengthy legislation with respect to closing orders of the effect they are to have upon the relations which before the closing order becomes operative subsist between the landlord and the tenant of the house to which the order applies. It seems to me that the present case is one in which it is highly expedient for a Court of first instance to decide no more than is necessary for the decision of the particular case. In my opinion in the light of the enactments referred to above and in the circumstances of this case it is not possible to say that the defendant's tenancy of River Cottage was subsisting in October, 1920, or that the defendant in any event had any legal right whatever to retake possession of those premises as and when he did. In my view in so doing he was a mere trespasser, and the defence which he has sought to set up to this action fails. The defendant was in breach of his statutory duty, and indeed also of his personal undertaking, in remaining in possession even up to May 11, 1920, and when he was once out he was under a statutory duty to obey the terms of the closing order then operative by staying out, and was violating his statutory obligation by going in again while the closing order was still in force. In my opinion the plaintiff is entitled to succeed in this action, and there will be an order for delivery of possession to him by March 31 next. He is also entitled to damages, which I assess at 35*l.*, and the defendant must pay the costs of this action.

Judgment for plaintiff.

Solicitors for plaintiff: *Hiscocks & Co.*

Solicitors for defendant: *Scott Duckers & Thompson.*

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Acton J.

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[IN THE COURT OF APPEAL.]

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THE KING *v.* CHESHIRE COUNTY COURT JUDGE
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Ex parte MALONE.

County Court—Jurisdiction—Action for Declaration and Injunction—Damages not claimed nor recoverable in Law—Application to amend by claiming Damages less than 100l.—Refusal of Leave—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 56—County Courts Act, 1903 (3 Edw. 7, c. 42), s. 3—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 89.

A member of a trade union brought an action in the county court for a declaration that a resolution of the trade union purporting to expel him from the union was ultra vires and void, and an injunction to restrain the union from acting upon the resolution. The particulars of demand did not include any claim for damages, and, having regard to the nature of the action, no damages could have been recovered :—

Held, upon the true construction of s. 56 of the County Courts Act, 1888, that the county court judge had no jurisdiction to entertain the action. It is essential to the jurisdiction of the county court in such a case that there should be a money claim not exceeding 100l., and, when no such claim is made and established, the Court cannot grant ancillary relief by way of declaration or injunction.

Semble, that the plaintiff itself should state the amount of the money claim in order to show that the case comes within the jurisdiction of the county court.

Kelly v. National Society of Operative Printers' Assistants (1915) 84 L. J. (K. B.) 2236, and *Stiles v. Ecclestone* [1903] 1 K. B. 544, distinguished.

Decision of the Divisional Court [1921] 1 K. B. 301 reversed.

APPEAL from the decision of the Divisional Court (Earl of Reading C.J., and Darling and Avory JJ.) (1) making absolute a rule for an order directing the county court judge to hear and determine the action.

The action was brought for a declaration that a resolution of the defendant union purporting to expel the plaintiff from the union was ultra vires and void, and an injunction to restrain the union from acting upon the resolution.

The facts are fully stated in the report of the case in the Court below. (1) The county court judge held that he had no jurisdiction to entertain the action on the ground that

(1) [1921] 1 K. B. 301.

no claim for damages was included in the particulars of claim, and no damages could have been recovered in the action having regard to the decision of the Court of Appeal in *Kelly v. National Society of Operative Printers' Assistants* (1) that in an action by a member of a trade union against the trade union for alleged illegal expulsion no damages are recoverable. At the hearing counsel for the plaintiff applied for leave to amend by adding a claim for 88*l.* damages. The county court judge refused leave to amend but, in order to facilitate an appeal, he assessed the damages in accordance with the plaintiff's evidence as to his loss of earnings at a sum which was within the limit of the jurisdiction.

The plaintiff having obtained a rule nisi for an order directing the county court judge to hear and determine the action the Divisional Court made that rule absolute.

The defendants appealed.

Merriman K.C. and *O. S. Hooper* for appellants. The question is whether the county court judge had jurisdiction to make a declaration or grant an injunction in a case where no damages were claimed or, if claimed, none would have been recoverable. In the High Court the question would not have been arguable. Under Order xxv., r. 5, a declaratory judgment could be made whether or not there was a cause of action: *Barwick v. South Eastern and Chatham Ry. Cos.* (2) The question in the present case depends upon the jurisdiction of the county court which is created by statute: Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 89; County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 56.

Malone's case is based on the declaration in *Kelly v. National Society of Operative Printers' Assistants*. (1)

It is submitted that the relief cannot be given in the county court.

[*Lias* referred to County Court Rules 1903-1920, Order xxii., r. 16.]

The effect of *Kelly's Case* (1) is that the plaintiff cannot maintain an action for damages against the defendants.

(1) 84 L. J. (K. B.) 2236.

(2) [1921] 1 K. B. 187.

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He is tied to the cause of action he alleged at the time he issued his plaint note in the county court: County Courts Act, 1888, s. 73.

In *Stiles v. Ecclestone* (1) it was held that an action, in which an injunction only was claimed, was within the jurisdiction of the county court, provided that the case was one in which, if there had been a claim for damages, the claim must have been for an amount within the jurisdiction of the county court. That does not apply to the present case. Here no claim for damages would have been maintainable. No evidence could have been given that was not stated in the summons: County Courts Act, 1888, s. 80.

By s. 87 of the same Act power is given to the county court judge to amend all defects and errors in any proceedings in the Court. If therefore an amendment was proper to be allowed it is admitted that the judge might have made it. He however refused to amend so as to give himself jurisdiction: *Hopper v. Warburton*. (2) It is submitted that he was right in refusing to allow an amendment by adding a claim for damages, and in holding that he had no jurisdiction to extend the plaintiff's claim; and that the Court of Appeal has no jurisdiction to do so where the point was not taken in the county court. The point as to jurisdiction was not open to the county court judge, as no one took it before him: *Kelly's Case*. (3) As showing that the point not having been taken in the county court it cannot be taken in the Court of Appeal: see *Taylor v. National Amalgamated Approved Society*. (4)

[SCRUTTON L.J. The point was doubted by Buckley L.J. in *West Riding of Yorkshire Rivers Board v. Linthwaite Urban Council*. (5)]

[YOUNGER L.J. Can you have a quia timet action in the King's Bench Division?]

It is submitted that you cannot: *Martin v. Bannister*. (6) If actions for apprehended damages were allowed in the county

(1) [1903] 1 K. B. 544.

(2) (1863) 32 L. J. (Q. B.) 104.

(3) 84 L. J. (K. B.) 2236, 2238.

(4) [1914] 2 K. B. 352.

(5) [1915] 2 K. B. 436, 440.

(6) (1879) 4 Q. B. D. 491.

court they might be used in order to give the Court unlimited jurisdiction.

The plaintiff must disclose his cause of action in his particulars of claim subject to amendment before the hearing.

Stiles v. Ecclestone (1) is distinguishable, but, if not, it is submitted that it was wrongly decided. It cannot be extended to cover this case.

[They also referred to Annual County Courts Practice, 1921, p. 375, note to Order VI., r. 1: "If the particulars do not disclose a cause of action within the jurisdiction, the defendant may obtain a prohibition."]

Lias and Elliott Gorst for the respondent (the plaintiff). The county court judge had jurisdiction to try the action.

[LORD STERNDALÉ M.R. If he had no power to give damages under s. 56, he could not grant ancillary relief.]

In *Kelly v. National Society of Operative Printers' Assistants* (2) the Court of Appeal, although they held that damages were not recoverable, allowed the declaration and injunction to stand. It was a deliberate decision.

The respondent had a personal right of action within s. 56 for a declaration affirming his right of membership of the Society, and for an injunction to prevent interference with that right.

In *Osborne v. Amalgamated Society of Railway Servants* (3) Moulton L.J. said that since the passing of the Judicature Act, 1873, s. 89, sub-s. 3, the Courts, including the county courts, had jurisdiction to make declarations even where no consequential relief is asked for.

The respondent's contract of membership has been broken and his right of property has been interfered with. That gives rise to a right of personal action. The county court judge was wrong in refusing leave to amend and so give himself jurisdiction. In *Taylor v. National Amalgamated Approved Society* (4), Bankes J. said: "Then it was objected that the judge amended the particulars of claim by adding a

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(3) [1911] 1 Ch. 540.

(4) [1914] 2 K. B. 352, 359.

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claim for a declaration and so gave himself jurisdiction. That point is not well founded."

[They also referred to Halsbury's Laws of England, vol. xxvii., s. 1156, p. 612, and s. 1159, p. 615, and to *Gozney v. Bristol Trade and Provident Society*. (1)]

Osborne's Case (2) shows that the respondent has a right of action for breach of contract. It is a personal action and it does not matter what the damages are provided that they turn out to be less than 100*l.* The fact that no damages at all were claimed brings the case within s. 56: *Russell v. Amalgamated Society of Carpenters and Joiners*. (3) This is a personal action where a demand is made, and until it is proved that the claim exceeds 100*l.* the county court has jurisdiction to entertain it.

If the demand in a personal action exceeds 100*l.* but the plaintiff desires to abandon the excess, he must enter the abandonment in his particulars: County Court Rules, 1888-1903, Order VI., r. 1.

Formerly the excess might be abandoned at the hearing: *Isaac v. Wyld*. (4)

Where the matter in dispute is whether the limit of the jurisdiction is exceeded the county court judge should determine the matter judicially, and if he finds it is within his jurisdiction he should go on and hear the action: *Sunderland v. Glover*. (5)

[They also referred to *Chambers v. Tabrum*. (6)]

LORD STERNDALÉ M.R. This is an appeal from a Divisional Court which reversed the decision of the county court judge of Cheshire sitting at Birkenhead, who refused jurisdiction in an action brought before him by a Mr. Malone. I am not going into the facts more than to say this: Mr. Malone was expelled by his trade union on a ground which I need not particularise, a ground which the learned county court judge held, and would have acted upon the holding, if he had

(1) [1909] 1 K. B. 901.

(2) [1911] 1 Ch. 540.

(3) [1912] A. C. 421.

(4) (1851) 7 Ex. 163.

(5) [1915] 1 K. B. 393.

(6) [1920] 1 K. B. 840.

jurisdiction, was an insufficient and wrong ground, which gave him a right to complain of the conduct of his trade union. But the learned county court judge said that he had no jurisdiction to entertain the action in the form in which it was before him. It becomes necessary, therefore, to see what the action was, and perhaps, before seeing what the action was, it may be important to see what the jurisdiction of the county court is. The jurisdiction of the county court is derived from the County Courts Acts of 1888 and 1903. The Act of 1888, in s. 56, says: "All personal actions, where the debt, demand, or damage claimed is not more than one hundred pounds, whether on balance of account or otherwise, may be commenced in the Court," with certain provisions to which I need not refer. Therefore the jurisdiction so far as this case is concerned is limited to a personal action where the debt demand or damage claimed is not more than 100*l*. Then by the Judicature Act of 1873, s. 89: "Every inferior Court which now has or which may after the passing of this Act have jurisdiction in equity, or at law and in equity, and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counterclaim equitable or legal . . . in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice." So that the powers conferred by that section are powers of giving relief, and so far as they give the right to grant injunctions or to make declarations, they are injunctions or declarations in aid of the relief which the county court has power to give. That is, I think, important to notice for this reason: What was claimed in this case was a declaration and an injunction. Now, unless s. 89 of the Judicature Act of 1873 gives a power to make declarations, there is no power in the county court to make declarations on this part of its jurisdiction. There is, as is well known, in the High

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Court now a power, under Order xxv., r. 5, by which declarations of rights may be made although no consequential relief is claimed or can be given. That jurisdiction was clearly established in the High Court by what are ordinarily called Form IV. cases, among them being *Burghes v. Attorney-General* (1), and by the case of *Guaranty Trust Co. of New York v. Hannay & Co.* (2) But that order and that power have nothing whatever to do with the county court. The county court derives its power to make declarations, if at all, under s. 89 of the Judicature Act, as one of the reliefs, remedies, or combination of remedies which it can give.

The question is whether the county court had jurisdiction to do that in this case. I think it follows, if I am right in what I have said, that the declaration or the injunction can only be granted where there is an action such as is described in s. 56 of the County Courts Act, 1888, and where the plaintiff has established a right to relief in that action. If the declaration or the injunction is merely ancillary to the other relief, as I think it is, then you must have established the right to the other relief in the action. Having said that, one has to look to see what the action was. There is no doubt that this was an attempt, and not an improper attempt, to extend the rights of parties in the county court by asking for a declaration instead of asking for damages or anything of that sort. The particulars of demand were : " A declaration that a resolution of the District Committee of the Birkenhead Branch of the Defendant's Society, passed on or about April, 1919, whereby it was resolved (*inter alia*) that the Plaintiff be expelled from the Society was *ultra vires* the Society and void and that the resolution was illegal unconstitutional and against public policy." Then a declaration that the resolution was *ultra vires* and void on other grounds ; a declaration that the action of the Executive Committee in certain matters was wrong, and " an injunction restraining the Defendants their Officers Agents or servants or the said District Committee from acting upon or enforcing the said resolution or any part thereof " ; and there it stops.

(1) [1911] 2 Ch. 139.

(2) [1915] 2 K. B. 536.

There was no claim for damages at all. There is nothing to show what the money value of this remedy, if it were granted, would be. It is possible that it might be very considerably over the limit, and it was argued that, because no damages were claimed, it could not be said to be outside the limit of the county court. I do not agree with that at all. There is no indication of a claim for damages here. There is simply an omission to make any claim at the time ; and that there was not originally intended to be any claim for damages is shown by the fact that during the course of the case counsel for the plaintiff asked for leave to claim damages. He did not in the first place mean to negative his right to make the claim, he simply left it out in order, quite rightly if he could, to get within the jurisdiction of the county court ; whereas if he had quantified it and put it into money it would have been very difficult at the time the claim was originally lodged consistently with the attitude which up to that time had been taken up to bring it within the limit of the county court jurisdiction, because the claim that had been made in the correspondence was 150*l*. Therefore the claim was left out in order that the same remedy and same advantage might be got without naming the sum. Now it seems to me that that is a thing which cannot be done, and for this reason : It entirely ignores the limited jurisdiction of the county court. It is not at all difficult to suppose cases in which declarations of right might be asked for in this way, which might actually involve many thousands of pounds in money ; and if such a case as that could be got into the county court simply by leaving out the technical claim for damages, the limit of the county court jurisdiction might be entirely abolished whenever there was a right to ask for a declaration. I think that is wrong and cannot be done. At the hearing of the case objection was taken to the claim on the ground that no damages were claimed, and therefore the claim could not be quantified. Thereupon counsel asked to be allowed to amend his particulars of claim, by claiming 88*l*. for loss of wages in consequence of the action of the defendants. The learned county court judge refused that application

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to amend. He had a perfect right to do so. It was a matter for his discretion, and I think he might very well say: "No, you have tried it on; you have framed this claim without a money demand for damages in order to escape any difficulty as to the jurisdiction, and I will not now allow you to amend by introducing a claim which is nominally within my jurisdiction." I say nominally for this reason; that the amount eventually claimed was only a part of the money result that might have followed if the declaration had been granted. The plaintiff would perhaps have been entitled to that amount for loss of wages, but he would also have been restored to an amount of benefit in the society, which he had lost by the expulsion, and which had not been regained by his reinstatement, because he was only reinstated as a new member, and he thereby lost certain benefits. The learned county court judge, at any rate, had a discretion to grant or refuse that application, and he refused it. And he then said, in accordance with the law as it now stands, that, even if the claim for 88*l.* had been made, it could not succeed because of the decision in *Kelly v. National Society of Operative Printers' Assistants*. (1) That was a decision of this Court, which binds us till the House of Lords reverses it, that such damage as was claimed here cannot be recovered in law, because a member of a voluntary society like this cannot sue the society for damages which he alleges he has suffered by their action. I do not think it necessary to go into the reasons which the Court gave for its decision. That is the law until the House of Lords alters it. Therefore the learned county court judge said that, even if he had taken that question of damages into account, there could have been no recovery of any damages at all, and he held that he had no jurisdiction to grant either the injunction or the declaration which was asked for. I think he was right. I myself think—I am prepared to go so far as this—that a claim for such a declaration as this cannot be brought in the county court without anything to limit the money result of it, so as to disregard the limit of the jurisdiction of the county

(1) 84 L. J. (Q. B.) 557.

court altogether. As I have pointed out it would be possible by simply omitting a claim for damages to bring into the county court an action for a declaration which might involve a money result of many thousands of pounds. I do not think that can be done. I do not think it matters very much whether you say that the limit must be put in the particulars or not. My personal opinion is that it ought to be put in the particulars, but at any rate where there is a claim of this kind, which cannot be tested by any money test at all upon the face of the claim, that in my opinion is not a claim which can be made in the county court.

But in my opinion there is another objection. As I have said this power of granting an injunction or declaration is simply ancillary to a right of relief in such an action as is mentioned in s. 56 of the Act of 1888. When the county court judge once ascertained that according to the case of *Kelly v. National Society of Operative Printers' Assistants* (1) he had no power to give any damages at all, then he had no power to give the ancillary relief of either injunction or declaration. Therefore, on that ground also, I think he was right. It is both true and curious that in *Kelly v. National Society of Operative Printers' Assistants* (1), which also came from the county court, the Court of Appeal dealing with the case in which the county court judge and the Divisional Court had given damages and an injunction and a declaration, struck out the claim for damages on the ground that they were not recoverable, but left the injunction and the declaration standing, and it was argued that that is an authority, which we must follow, that there may be such a declaration in the county court, although there cannot be an action for damages. If the point had been under the consideration of the Court in that case, I should have felt bound to follow it. But it is obvious that the point which is now before us was never even remotely hinted to the Court, and that the Court from beginning to end there dealt with the whole matter as if there were no distinction between the jurisdiction of the county

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court and the jurisdiction of the High Court, and having regard to those considerations I do not think the decision in that case binds us upon that point.

For these reasons I think that the Divisional Court was wrong, and that the learned county court judge was right. I cannot agree, with the greatest respect, with the Lord Chief Justice that, when an application was made to amend, there was then a claim which would come within s. 56. That section refers to the claim that is to be made according to the Act of Parliament, and according to the rules of the county court, and not to some additional items which the plaintiff chose to try and bring in in the course of the case when he found himself in a difficulty, because he had not included it in his particulars of claim. Nor can I agree, with respect, to one of the grounds of Darling J.'s decision that "demand" is something very much wider than "debt or damages." It is difficult to say what a "demand" is, but it must be one which does not exceed 100*l*. It therefore must be a demand of the same nature as "debt" and "damages" which can be estimated in money, and which, thus estimated in money, does not exceed 100*l*. I think the distinction which Avory J. drew between limit of jurisdiction and the existence of a good cause of action is a sound one, but I do not think it is of importance in this case, because, as soon as it is ascertained that the main relief claimed in a personal action—namely, a sum of money—cannot be recovered because it exceeds the limit, then at once the jurisdiction of the county court ceases and the Court cannot therefore give the ancillary relief either of injunction or declaration. Therefore I think the decision of the Divisional Court should be reversed, and the decision of the county court judge restored with costs here and below.

SCRUTTON L.J. This is one of those cases which, though a lawyer may find it interesting, a layman like the plaintiff finds heart-breaking, because, wanting to find out whether he has been properly expelled from his society, he finds the case decided against him on a ground which he cannot

understand. The reason of that is that to the lawyer the point which is being argued is whether a Court with limited jurisdiction, the county court, has or has not the powers which the plaintiff asks it to exercise; whereas it is quite clear that if the case had been brought before the High Court, the High Court could have given the relief for which the plaintiff asks, and we are going to hold that the county court could not give him that relief because of the limited terms of its jurisdiction created by statute.

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Mr. Malone brought an action against the United Society of Boilermakers in the county court. He asked first of all for a declaration that a resolution of the committee of a particular branch was ultra vires, void, illegal, unconstitutional, against public policy and unauthorized by the constitution of the society. He asked for a declaration that the action of the committee in turning him out fell under the same string of condemnations, and for an injunction restraining the defendants and the district committee from acting upon the resolution, and he did not include any claim for damages. He or his advisers deliberately, and as they thought at the time with astuteness, did that because of a decision of the Court of Appeal, that such a person, a member of an unincorporated trades union, could not recover damages against the union, he himself being a member of the body which he was suing, according to the ordinary principles of law that a man cannot recover damages against himself, and for that reason the plaintiff did not include a claim for damages in his plaint in the county court. When the case came before the county court judge it at once occurred to him that there was a question whether, if there was no money claim, he could have any jurisdiction. The plaintiff's counsel then asked leave to amend by adding a claim for damages. The learned judge refused the leave to amend on the ground that the application was made too late, and that it affected the jurisdiction of the Court; and he, therefore, without expressing any opinion on the merits, and assessing the damages at 88*l.*, if he had jurisdiction, gave judgment against the plaintiff on the

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ground that he had no jurisdiction to entertain a claim for a declaration and injunction when no money claim was made. The Divisional Court reversed that decision, as I understand, on two grounds—first, that a money claim was made as soon as an application was made to amend by adding the money claim; and secondly, that a money claim being made in that way, the fact that it might turn out to be irrecoverable did not affect the jurisdiction, and held that there was jurisdiction to hear the question whether it was recoverable, as the fact that such a claim had been held to be irrecoverable did not affect the original jurisdiction to hear it or to grant ancillary relief.

The appeal now comes to this Court. It seems to me that the first and fundamental question is, What is the meaning of s. 56 of the County Courts Act, 1888, which confers jurisdiction on the county court? “All personal actions, when the debt, demand, or damage claimed is not more than 100*l.*, whether on balance of account or otherwise, may be commenced in the Court”; with, of course, the natural implication that actions which do not come within that description cannot be commenced in the Court. It seems to me there are two possible meanings of that section. First, it might be said that the section means all personal actions may be commenced unless there is a money claim of more than 100*l.*, in which case, if you have no money claim at all, you have not a personal action with a money claim of more than 100*l.* Having regard to the fact that the county court is an inferior court, obviously intended to be limited to actions of small monetary consequence, I cannot take the view that the section means that any question in a personal action may be raised provided you do not make a money claim in respect of it. You may be raising questions of enormous importance both as to character and ultimate business results, and I cannot think that Parliament intended such questions to be decided by an inferior Court, if any money claim was omitted from the particular plaint. The other view is that it is essential to the jurisdiction of the Court that there should be a money claim not exceeding 100*l.* That I think is the true view of the section, and in that view it is essential that the plaint

should show that the money claim made does not exceed 100*l*. I do not know that it is necessary for us finally to decide it, but I am inclined to agree with the view of the Master of the Rolls that the county court being a court of inferior jurisdiction, the plaint should show that the matter is within the jurisdiction of the Court, and therefore that the plaint itself should state the limit of the claim, or of the value of the subject-matter so as to show that the case comes within the jurisdiction of the Court. At any rate the authorities seem to go to this, that if in the course of a case it appears by the evidence that the money claim, or the value of the matter in dispute, exceeds the statutory limit, the jurisdiction of the judge ceases. For instance, to take one case only, in *detinue* you do not start with a money claim, you start with a demand for the return of the goods, and you go on to state "or their value" in the case of goods which are not returned; and in *Leader v. Rhys* (1) Keating J., in a case where the value of the piano for which *detinue* was brought was 130*l*., said: "The plaintiff, therefore, could not have entered a plaint in the county court; for, the moment it appeared that the value for which the plaintiff was suing exceeded 50*l*., that Court could have proceeded no further." That is to say, in the case where the claim turns out to be in excess of the jurisdiction, the moment it is made to appear to the judge that there is that excess of value or claim, his jurisdiction under the statute ceases. The same result happens when it appears that there is no money claim at all, if, as I have stated, the statute requires a quantified money claim to found jurisdiction in the county court.

In this case there is no claim for money. There is intentionally no claim for money. I do not take the view of the Divisional Court that you make a claim for money when you ask to amend the proceedings in which there is no claim for money by adding such a claim. What you are doing is asking to introduce a claim into a proceeding, and if that application is refused there is no money claim in the proceeding, the proceeding remains as it was before, without

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1921 reason given by the Divisional Court.

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The second reason given by the Divisional Court is this, and for part of it a great deal may be said. You must not confuse jurisdiction with weakness of claim. The judge may have jurisdiction to decide a claim although he decides against it, which I understand is the view taken particularly by Avory J. and also by the Lord Chief Justice. But in my view, where the jurisdiction of the county court depends upon a money claim not exceeding a particular amount, and requires that there should be a money claim, when once it is decided that there is no such claim in law the jurisdiction of the Court to do anything further ceases. It may be put as a matter of jurisdiction ceasing. It may be put in this way: The principle is that there must be a money claim. If there is no valid or justifiable money claim the ancillary remedies, such as injunction and declaration, cannot be granted. For that reason I should dissent also from the second ground on which the Divisional Court reversed the judgment of the county court judge. To take Avory J.'s own illustration. Supposing that a plaint is brought in the county court against a highway authority for damages for non-repair of a highway. I agree it is a personal claim, and there is jurisdiction in the Court to hear it; but in my view the moment the county court judge decides that there is no valid claim, because no claim against a highway authority for damages for non-repair will lie, his jurisdiction to do anything further ceases, and it would not be open to the county court judge to go on to say: "I will make a declaration that the highway is a public highway repairable by the Highway Authority." Or to take a case of detainment, when once it appears either that there is no money value in the thing detained, no money claim, or that the value is in excess of the limit, 150*l.* instead of 100*l.*, the Court cannot go on and make a declaration that the plaintiff is the owner of the thing detained, and the ordinary jurisdiction would cease. As I understood the argument for the plaintiff it was this: It is quite true there is here no claim for debt and no

claim for damages, but there is a demand, and a demand need not be followed by a money claim ; and I understood the demand suggested was a demand that the plaintiff should be in fact reinstated as a member of the Society from which he had been expelled ; and he said such a demand could be enforced by means of a declaration in a personal action. I cannot help thinking that would have much astonished the learned men who first used the phrase “ personal action.” I think they had not the advantage of being acquainted with such a thing as a declaration, and they would have been very much puzzled by an action for a declaration in a case where no other relief was claimed. I refer merely to one authority—Blackstone’s Commentaries, vol. iii., p. 117—and I find : “ Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof ; and likewise whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs.” The idea of something which was not a claim for money founded on contract, or a claim for money founded on tort, but was a demand for a declaration, I think never occurred to Sir William Blackstone, and I do not think, when the Legislature used the phrase “ personal actions” it was thinking of any such matter as declarations, which were practically unknown in the county court ; it was thinking of the old distinction which is dealt with in the statute between personal and real actions, for having dealt with personal actions in s. 56, the Legislature goes on to real actions, or actions similar to real actions in s. 59, where it deals with the recovery of lands and tenements : for that reason I think that the ingenious suggestion of the plaintiff’s counsel as to the meaning to be given to “ demand ” in s. 56 fails.

I am glad it is unnecessary for us in this case to go into the question of the exact relation of *Kelly’s Case* (1) and *Osborne’s Case*. (2) I do not understand them. In *Kelly’s Case* (1) the Court decided that a person in the position of the present plaintiff could not recover damages against a society of which

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(1) 84 L. J. (K. B.) 2236.

(2) [1911] 1 Ch. 540.

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he was a member, because he himself was a member of that unincorporated body, and you cannot, on a contract between yourself and yourself, recover damages against yourself. But the Court in *Kelly's Case* (1) did grant a declaration and injunction to the plaintiff against himself, without apparently seeing that there was any inconsistency. If they had considered this point we should have been bound by their decision, whatever the result of it was; but I cannot find any trace in the judgment that it occurred to anybody to consider the effect of that action having come from a county court, and the effect of the limited jurisdiction of the county court upon that point. In *Osborne's Case* (2) a declaration and injunction in the High Court were granted to the plaintiff, who was a member of an unincorporated body which he sued, and I do not see that in that case the point taken in *Kelly's Case* (1) about damages was considered by the Court, that is whether a man can get damages or any other relief against himself or against a body by its trade name which includes himself. It may be that in some future stage of trade union litigation, which is likely to occupy the Court for many years to come, that that important point may come up for consideration; and I only desire at present to guard myself from expressing any opinion one way or the other about it, except by saying that I do not at present understand the relation of *Kelly's Case* (1) and *Osborne's Case* (2) to each other. I think for the reasons I have given, the reasons given by the Divisional Court for reversing the decision of the county court judge, on the proper view of the statute, fail, and that the county court judge was therefore right in the view which he took that he had no jurisdiction to give relief by way of declaration or injunction in a case where no money claim was made to found his jurisdiction under s. 56 of the County Courts Act. For these reasons I agree that the judgment should be reversed.

YOUNGER L.J. I am of the same opinion. One has only to look at the particulars of demand filed by the plaintiff in

(1) 84 L. J. (K. B.) 2236.

(2) [1911] 1 Ch. 540.

the county court to see that his action against the defendant society was based, and was intended to be based, exclusively upon the rights declared to be competent in respect of such a complaint by the Court of Appeal in *Osborne's Case*. (1) The form of the particulars of demand follow almost textually, with the necessary adaptations, the statement of claim in *Osborne's Case* (1), and this is here of importance, particularly in view of one of the arguments put forward on behalf of the respondent. Now the fact that this action is based upon *Osborne's Case* (1) necessarily connotes that the plaintiff was deliberately refraining from bringing against the defendants any claim which could, on the true construction of the Trades Union Act, 1871, s. 4, be said to have been withdrawn from the cognizance of any Court by virtue of that section: the decision in *Osborne's Case* (1) was that the claim there made by the plaintiff, and successfully made, was one of which the Court could take cognizance, notwithstanding that section, because it was not a claim within that section. The plaintiff's claim here is equally a claim not within that section, and it is one which he is in a position in a proper Court to maintain, whether in point of fact the rules of this particular society are rules in restraint of trade or are not. But so soon as you find that the plaintiff has instituted proceedings which exclude from their range any matter of complaint which is referred to in s. 4 of the Trades Union Act, 1871, you find also that there is necessarily excluded from those proceedings any claim for damages in respect of such claim, and the result is that the plaintiff, maintaining this action on the footing of the claim in *Osborne's Case* (1), if he be entitled to claim anything in the nature of damages, the damages claimed must be other than those covered by s. 4. In other words they must be just such damages as he did at one stage of these proceedings particularize—namely, the loss that he had sustained through his expulsion from the defendant society, in that for a particular period of time he was unable to obtain employment elsewhere. Now unfortunately for the plaintiff it has been decided by the Court of Appeal in *Kelly's Case* (2) that no Court,

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neither a county court, nor any other Court, is entitled to award damages in respect of such a claim brought by a member of a trade union against his union. These are not damages cognizable by any Court at all as founding any legal claim to relief. Accordingly until *Kelly's Case* (1) is set aside, by some tribunal superior to this, such a plaintiff as we have here must be in a position to say that his action was within the jurisdiction of the county court, although it was an action in respect of which no sum, however small, could have been awarded to him by the judge, however successful in his claim he might be. In other words the question that has to be determined on this appeal is this: Whether so long as *Kelly's Case* (1) stands unreversed a plaintiff, a member of a trade union, is entitled to maintain an action in the county court for the relief which the plaintiff in fact obtained in *Osborne's Case* (2)—that is to say, for a declaration and an injunction followed by no award of any money compensation. Now that depends entirely upon the question whether such an action or such a claim is within s. 56 of the County Courts Act, 1888, the first sentence of which I will read. [His Lordship read it and continued:] The first question one asks oneself is, What are the personal actions which under that section may be brought in the county court? and as a matter of construction I myself have no doubt that the words which follow the words “personal actions”—namely, “When the debt demand or damage claimed is not more than 100*l.*, whether on balance of account or otherwise”—are all of them words of qualification of the words “personal actions,” and that no personal action with regard to which you are unable to say that it is one where the debt demand or damage claimed is not more than 100*l.*, whether on balance of account or otherwise, is a personal action within the jurisdiction of the County Courts Act under this section at all. If I had any doubt upon the question whether the section could be construed as extending, as has been suggested, to actions for declarations or other incidental relief or for any form of order that may be made in any personal action not in itself involving the payment

(1) 84 L. J. (K. B.) 2236.

(2) [1911] 1 Ch. 540.

by the defendant of any sum of money, it would, I think, be resolved by the last words of the sentence which I have read that "all such actions"—that is to say, the personal actions which are previously referred to—"shall be heard and determined in a summary way." It appears to me that those words undoubtedly confirm the view that one would apart from them take of the section, that what is referred to are actions of the description stated resulting in a money claim and a money payment, either in the form of debt or damages, and that it is not intended to refer to or comprise vague things like declarations which, not resulting in payment directly by the defendant to the plaintiff, may nevertheless affect their relations in respect of property which in point of value is beyond any limit of value in any section of the County Courts Act. Accordingly it does appear to me that the answer which has to be given to the question: May an action asking for the relief in *Osborne's Case* (1), in respect of which no kind of award can be made at all by the Court which would secure for the plaintiff any payment in money, be brought within s. 56 of the County Courts Act, 1888? is in the negative.

The Divisional Court has held otherwise, and so far as I understand the judgment of the learned judges one of the grounds of their decision was based upon *Stiles v. Ecclestone* (2) where there was on the plaint no demand or claim for any sum of money at all, and an injunction only was asked for. But that was an action for breach of a covenant in restraint of trade by a former master against his servant, under which a sum of 40*l.* was fixed as the sum to be recoverable, by way of liquidated damages or a penalty, in the event of any breach. Therefore, whether you have regard to the claim made in that action as being one in respect of breach of contract, which would necessarily carry with it nominal damages, or whether, as the Court in that case were inclined to regard it, as an action brought in respect of a breach of contract in respect of which no more than 40*l.* damages could be recovered, it seems to me that, however that case be

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viewed, it is entirely different from the present, because there the claim for damages, whether substantial or considered as being nominal only, brought the case entirely within the cognizance of the county court. The difference between that case and this is that here there is no sum, however small, not even a farthing, which the county court judge in this case could legally award to the plaintiff in respect of damages. But then Darling J. in the case under appeal took the view that while that was right, so far as the words of s. 56 "debt" or "damage" were concerned—that is to say, he felt that no action would lie within s. 56 unless the debt were a legal debt and the damages were damages which could be legally recovered—nevertheless he was, I think, somewhat reluctantly led to the conclusion that he could hold that the action was maintainable by reason of the use of the word "demand." In other words he seems to have taken the view that an irrecoverable debt or irrecoverable damages might, within the meaning of s. 56, be converted into a demand. When you find that the irrecoverable demand, because this we must assume to be the meaning of the word, must be nevertheless limited to 100*l.*, one does ask oneself why there should be any limit in money at all in respect of the thing that is irrecoverable, and when one asks oneself that question, I think one sees, that the demand equally with the debt, and equally with the damage, must be a legal one, of which the Court can take cognizance. Accordingly it does seem to me that none of the reasons so far given by the Divisional Court are such as to show that s. 56 gives any jurisdiction.

Then I take the other case which was put by Avory J. where he figured to himself an action brought against a highway authority for non-repair of a highway, in respect of which damages are not recoverable, but which he seemed to think might nevertheless be within the cognizance of the county court. Avory J. did not say in express terms that, in such an action, where damages were not recoverable, it would be permissible for the county court to make a

declaration and grant an injunction. If he had thought of that point I think he would have hesitated to say that it would have been permissible for the county court to award such an injunction or to make such a declaration, because I think that, having regard to the express terms of s. 56, and also to s. 89 of the Judicature Act, 1873, which enables a county court to give all relief and all proper relief in respect of actions within its cognizance, it must follow that there can be no declaration made by the county court, nor can there be any injunction granted by the county court, except in a personal action in respect of which it has originally jurisdiction. And if one arrives at the conclusion that the personal action which has been framed in the way I have described and, for the reasons that I have given, is not on its true construction within s. 56, then it appears to me to follow that there can be no incidental relief in an action which is itself without the cognizance of the county court judge. I think it may very well be that an action would not necessarily in the first instance appear on the face of the proceedings to be beyond the cognizance of the Court, so that some actions would have to stop in limine, and others might have to go on to a particular stage until the obstacle, which prevented the further proceedings under the terms of the statute, became apparent. But so soon as it is made plain to the county court judge that the action is not within s. 56, and that he is being asked to deal with a dispute which is beyond his jurisdiction, then it becomes at once his duty to stop the proceedings and dismiss the action.

For these reasons I am of opinion that the view taken by the Divisional Court was erroneous and that the appeal should be allowed.

Appeal allowed.

Solicitors: *J. A. Behn, Liverpool; Arthur Sugden, for R. Barrow-Sicree, Liverpool.*

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[IN THE COURT OF APPEAL]

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Feb. 22, 23. *In re* AN ARBITRATION BETWEEN MAHMOUD AND ISPAHANI.

Contract—Emergency Legislation—Sale of Linseed Oil—Sale and Purchase prohibited except under Licence—Seller having a Licence—Purchaser not having a Licence—Representation by Purchaser that he had a Licence—Illegal Contract—Right of Seller to sue Purchaser on Contract—Seeds, Oils and Fats Order, 1919.

By the Seeds, Oils and Fats Order, 1919, made under the Defence of the Realm Regulations, "a person shall not either on his own behalf or on behalf of any other person buy or sell or otherwise deal in . . . any of the articles specified in the schedule hereto, whether situated within or without the United Kingdom, except under and in accordance with the terms of a licence issued by or under the authority of the Food Controller." Linseed oil was one of the articles specified in the schedule.

During the operation of the Order the plaintiff sold to the defendant a quantity of linseed oil. The plaintiff had a licence under the Order, and before entering into the contract he asked the defendant whether he had a licence under the Order, and the defendant told the plaintiff that he had. The defendant in fact had not a licence. The licence to the plaintiff provided that sales for delivery within the United Kingdom were only to be made to persons holding a licence. The plaintiff, being induced by the misrepresentation of the defendant and in the honest belief that he had a licence, entered into the contract of sale. The defendant subsequently refused to accept delivery of the linseed oil on the ground that the contract was illegal, as he (the defendant) had no licence under the Order. In a claim for damages for non-acceptance of the oil:—

Held that, as the defendant had no licence, the contract of sale was prohibited by the Order and was therefore illegal, and as the prohibition was in the public interest no claim could be made under the contract.

Bloxsome v. Williams (1824) 3 B. & C. 232 discussed.

Dictum of McCordie J. in *Brightman v. Tate* [1919] 1 K.B. 463, 472 disapproved.

APPEAL from the judgment of Rowlatt J. on an award in the form of a special case.

By a contract dated August 27, 1919, and made subject to the rules of the Hull Seed, Oil and Cake Association of the Hull Incorporated Chamber of Commerce and Shipping, Mahmoud (herein called the plaintiff) sold and Ispahani (herein called the defendant) bought 150 tons of linseed oil at 111s. per hundredweight to be delivered to craft or carts at Hull free of expense in buyer's casks,

delivery 50 tons during each month, October, November and December, 1919. By a clause in the contract all disputes on the contract were to be settled by arbitration in Hull. Both the plaintiff and the defendant carried on business in London.

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At the time when the contract was made there was in force and operation an Order issued on June 19, 1919 (which came into force on June 23, 1919), by the Food Controller under the Defence of the Realm Regulations and called the Seeds, Oils and Fats Order, 1919, which provided (clause 1) (a) : "Until further notice a person shall not either on his own behalf or on behalf of any other person buy or sell or otherwise deal in, or offer or attempt to buy or sell or otherwise deal in, any of the articles specified in the schedule hereto, whether situated within or without the United Kingdom, except under and in accordance with the terms of a licence issued by or under the authority of the Food Controller." By clause 2, the Order was not to apply to contracts in writing entered into before June 23, 1919. Clause 3 : "All parties to the purchase or sale of any of the articles specified in the schedule shall require or disclose (as the case may be) all such information as may be necessary or required by such parties or by or under the authority of the Food Controller, for the purpose of satisfying them or him that the provisions of this Order have not been contravened. . . ." By clause 4, "Infringements of this Order are summary offences against the Defence of the Realm Regulations." Linseed oil was one of the articles specified in the schedule to the Order.

Disputes arose under the contract and were referred to arbitration. The arbitrators disagreed, and the umpire made his award in the form of a special case.

On October 29, 1919, by letter of that date from the plaintiff to the defendant the plaintiff tendered delivery to the defendant against payment of the invoice price of the first instalment of 50 tons of linseed oil due under the contract ; but the defendant by letter to the plaintiff dated October 30 declined to accept the linseed oil, stating that he did not admit he had made any binding contract.

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1921 letters dated November 3 and 4 of his intention to sell,
MAHMOUD and on November 5 he sold the 50 tons at the best price
AND obtainable—namely, 86*l.* per ton less brokerage—and by letter
ISPAHANI, of November 6 he rendered an account to the defendant
In re. for the difference between the contract price and the sale
price.

By letter dated November 7 to the plaintiff the defendant contended that the contract of August 27, 1919, was invalid and illegal on the ground that no licence had been issued to him under the above-mentioned Order of the Food Controller, and that he would be subject to penalties if he carried out the contract. The defendant afterwards offered verbally to pay to the plaintiff 2000*l.* in settlement, which was declined.

The plaintiff subsequently tendered deliveries of the November and December instalments, each of 50 tons, but the defendant did not accept the same or either of them, whereupon the plaintiff sold against the defendant and suffered loss on each sale, the loss on the three instalments amounting to 2295*l.*

On the question of the defendant's liability under the contract the umpire found the following facts:—

- “(a) The plaintiff and defendant had made a similar contract on June 11, 1919, by which the plaintiff sold to the defendant 100 tons of linseed oil for delivery in July and August.
- “(b) The Order of the Food Controller of June 19, 1919, did not affect the said contract, but the terms and provisions of the said Order became known to and were the subject of discussion at interviews between the plaintiff and the defendant before the contract of August 27, 1919, was entered into.
- “(c) The plaintiff applied for and obtained a licence from the Food Controller under the said Order. The said licence is dated July 8, 1919, and was produced in evidence by the plaintiff. (1)

(1) The terms of the licence issued to the plaintiff authorizing him to

- “(d) At an interview between the plaintiff and the defendant some time in July, 1919, the plaintiff asked the defendant if he had obtained a licence under the said Order, and the defendant informed the plaintiff that he had applied for one. At a subsequent interview before August, 1919, the defendant informed the plaintiff that he (the defendant) personally and Messrs. Jules Karpeles & Co., Ltd., of which Company the defendant was a director, had both obtained licences from the Food Controller under the said Order.
- “(e) When the terms of the contract of August 27, 1919, were arranged and before it was reduced to writing the plaintiff inquired of the defendant whether he was buying for himself personally or on behalf of the said company Jules Karpeles & Co., Ltd., and was informed by the defendant that he was buying for himself personally. The contract was thereupon made out by the plaintiff in the name of the defendant who confirmed it personally by signing the confirmation slip.
- “(f) The statement by the defendant to the plaintiff that a licence under the said Order had been issued to his company Jules Karpeles and Co., Ltd., was true; but his statement to the plaintiff that he (the defendant) had obtained a licence under the said Order was false and untrue to his knowledge at the time he made it.
- “(g) No evidence was given by the defendant to show that at any time after he made the contract with

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purchase or sell certain articles, including linseed oil, were (so far as material) as follows: Clause 1 related to purchases of articles situate outside the United Kingdom. Clause 2: “Sales: Sales by you under the authority of this licence shall only be made” (a) related to delivery outside the United Kingdom.

“(b) For delivery within the United

Kingdom to persons holding a licence issued under the authority of the Food Controller authorizing them to purchase the articles sold for use in the United Kingdom and subject to any terms and conditions of such licence.” The licence was personal to the plaintiff and could not be assigned or transferred.

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the plaintiff he had made any attempt to obtain a licence.

“(h) The plaintiff was induced to enter into the contract by the representation made by the defendant that he had a licence under the said Order, and the plaintiff acted in good faith and in the honest belief that the defendant did have a licence entitling him to buy and deal in the goods covered by the contract.

“(i) The plaintiff was not guilty of any negligence in failing to require production of the defendant's licence for inspection before entering into the said contract. It is quite contrary to the practice among merchants to require production of such licences in entering into contracts, and the plaintiff in accepting the statement of the defendant, who was well known to him, without further inquiry followed the usual practice.”

It was contended for the defendant “that the contract between the parties was illegal and void ab initio on the ground that the defendant had not at the date of the contract or at any subsequent date a licence issued by the Food Controller under the Seeds, Oils and Fats Order, 1919, and that the plaintiff could not therefore at law enforce his claim based upon the said illegal contract.”

In the circumstances above set out the umpire did not give effect to this contention, and made an award, subject to the opinion of the Court, that the defendant should pay to the plaintiff the sum of 2295*l*.

The question for the opinion of the Court was whether in respect of the said contention the umpire came to a right determination in point of law. If the Court should be of opinion that he ought to have given effect to the said contention then he awarded and determined according to the opinion and judgment of the Court.

Rowlatt J. held that the plaintiff did not commit an offence against the Order, as he had a licence; nor did he aid and abet the defendant to commit an offence, because he

asked the defendant whether he (the defendant) had a licence and was told he had. He was therefore entitled to recover, and the award must be affirmed.

The defendant appealed.

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B. A. Cohen K.C. and *Frampton* for the defendant. The Seeds, Oils and Fats Order, 1919, which had statutory force, prohibited the sale and purchase of linseed oil without a licence; and by the terms of the plaintiff's licence he could only sell linseed oil to a person holding a licence. Therefore the plaintiff, by selling linseed oil to a person who had not a licence, committed an offence under the Order. It is immaterial that the defendant represented that he had a licence, and that the plaintiff acted on the representation. The Order prohibited the act and made it illegal: *Bartlett v. Vinor* (1) per Holt C.J., cited by Tindal C.J. in *De Begnis v. Armistead* (2); *Holman v. Johnson* (3); *Langton v. Hughes* (4), where Lord Ellenborough C.J. said: "What is done in contravention of the provisions of an Act of Parliament, cannot be made the subject-matter of an action." *Bloxsome v. Williams* (5) is distinguishable. There the Act in question—the Sunday Observance Act, 1677 (29 Car. 2, c. 7)—prohibited a tradesman or other person doing or exercising any work of his ordinary calling on a Sunday. The plaintiff, not knowing that the defendant was a horse dealer, made a verbal contract with the defendant on a Sunday to buy a horse from him for a sum exceeding 10*l*. The defendant warranted the horse to be sound. The horse was delivered to the plaintiff on the following Tuesday. In an action to recover for breach of warranty, it was held that the contract was not complete until the horse was delivered and accepted on the Tuesday, and that therefore the contract, not having been made on Sunday, was not void under the Act; but, assuming that the contract was made on the Sunday, the plaintiff, having no knowledge that the defendant was a horse

(1) (1692) Carth. 251, 252.

(3) (1775) 1 Cowp. 341, 343.

(2) (1833) 10 Bing. 107, 110.

(4) (1813) 1 M. & S. 593, 596.

(5) 3 B. & C. 232.

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dealer and was exercising his ordinary calling on the Sunday, could recover on the contract. The Act in that case prohibited the defendant exercising his ordinary calling on Sunday; it did not expressly prohibit the contract. It prohibited the defendant exercising his calling by selling the horse on a Sunday. Moreover the case was decided upon the ground that the contract was not made on Sunday, and the statement of the law on the assumption that the contract was made on Sunday was a dictum. In *Brightman v. Tate* (1) there is a statement by McCardie J. that "if the plaintiffs had bona fide believed that licences had been granted by the Ministry of Munitions I should have entertained a grave doubt as to the validity of the defendants' plea of illegality. Still graver would have been the doubt if such a belief had been induced by the words or conduct of the defendants"; and the learned judge referred to *Bloxsome v. Williams*. (2) That was however a mere dictum and should not be followed.

[*Whitham v. Lindley* (3) was also cited.]

R. A. Wright K.C. and *Bernard Campion* for the plaintiff. This is not like the case of a contract with an infant where there is no contractual capacity in one party, or of a contract where all the facts are known to both parties. This is a case in which apparently everything is in order, and the defect is in one party, unknown to the other party, which defect could have been put right by the party in default. In these circumstances the defendant cannot take advantage of his own contravention of the law. The case comes within the decision in *Bloxsome v. Williams*. (2) The decision there proceeded on two grounds, each of which was stated to be the ground of the decision, and not a mere dictum. Where a contract can be performed in a legal or an illegal manner, the defendant cannot set up as a defence to an action on the contract that the contract was intended to be performed by him in an illegal manner, unless he can show that the plaintiff knew that he (the defendant) intended to perform it in an illegal manner. *Langton v. Hughes* (4) affords an

(1) [1919] 1 K. B. 463, 472.

(2) 3 B. & C. 232.

(3) (1920) 37 Times L. R. 75.

(4) 1 M. & S. 593.

illustration of this principle; see also *Levy v. Yates*. (1) The plaintiff in the present case was not particeps criminis; he had made all the inquiries to satisfy clause 3 of the Order, and was an innocent party. The dictum of Parke B. in *Smith v. Mawhood* (2)—that he thought “the object of the Legislature” in the statute then under consideration “was not to prohibit a contract of sale by dealers who have not taken out a licence pursuant to the Act of Parliament. If it was, they certainly could not recover”—does not apply to a case in which, as in the present case, the defect is in one party, which defect is unknown to the other party and which could have been put right by the party in default. It must be taken to be qualified by the above-mentioned principle. There was no illegal act on the plaintiff's part, and he can recover.

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[SCRUTTON L.J. referred to *Cope v. Rowlands*. (3)]

[*In re Anglo-Russian Traders and Batt* (4) and *Brandt v. Morris* (5) were also cited.]

No reply was called for.

BANKES L.J. In this case the respondent sold to the appellant 150 tons of linseed oil on August 27, 1919. At that time there was in force the Order of June 19, 1919, made under the Defence of the Realm Regulations. The appellant refused to take delivery of the oil, and the respondent then made a claim against him for damages for his refusal to take delivery under the contract. The dispute went to arbitration, and the appellant set up that the contract of sale and purchase was an illegal contract and was therefore unenforceable. The arbitrator has stated his award in the form of a special case, the only question raised by the case being whether or not the appellant's contention is good in law. Rowlatt J. held that the contention was bad, and gave judgment for the respondent.

The first question is, What is the true construction of the Order of June 19, 1919? Clause 1 provides: “Until further

(1) (1838) 8 Ad. & E. 129, 134.

(3) (1836) 2 M. & W. 149.

(2) (1845) 14 M. & W. 452, 463.

(4) [1917] 2 K. B. 679.

(5) [1917] 2 K. B. 784.

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notice a person shall not either on his own behalf or on behalf of any other person buy or sell or otherwise deal in . . . any of the articles specified in the schedule hereto"—which included linseed oil—"whether situated within or without the United Kingdom, except under and in accordance with the terms of a licence issued by or under the authority of the Food Controller." The language of the clause is clear. It makes it illegal, on the part both of the buyer and of the seller, to enter into a contract prohibited by the clause. [The Lord Justice also read clauses 2, 3 and 4.] It is not material to consider, for the purpose of deciding this case, whether or not the respondent has been guilty of an offence under the Order. It is said, as I understand it, that, provided a person complies with the requirements of clause 3 and asks for information which would be "for the purpose of satisfying them or him that the provisions of this Order have not been contravened," all the requirements of the Order have been complied with. That is not my view of the Order. I think clause 1 makes such a contract as this illegal. Clause 3 is an additional requirement for securing that persons shall not enter into these contracts; but when one is considering what is the effect of non-compliance with clause 1, it seems to me to be immaterial whether they do or do not make the inquiries. The Order is a clear and unequivocal declaration by the Legislature in the public interest that this particular kind of contract shall not be entered into. The respondent had a licence; the appellant had no licence. The respondent contends that, as he had a licence, the appellant cannot be heard to say that in the circumstances he had not a licence. I cannot assent to that proposition. I do not think there is any authority for it, and as the language of the Order clearly prohibits the making of this contract, it is open to a party, however shabby it may appear to be, to say that the Legislature has prohibited this contract, and therefore it is a case in which the Court will not lend its aid to the enforcement of the contract.

The decision of McCardie J. in *Brightman v. Tate* (1) has

(1) [1919] 1 K. B. 463, 467.

been cited, where in the early part of his judgment he referred to statements of the law upon the point by very learned judges. He referred to the language of Holt C.J. in *Bartlett v. Vinor* (1); and also to the statement of Lord Ellenborough C.J. in *Langton v. Hughes* (2)—namely, that “what is done in contravention of the provisions of an Act of Parliament, cannot be made the subject-matter of an action.” In addition to those statements of the law I will cite the statement by Le Blanc J. in *Langton v. Hughes* (3): “It is an established principle, that the Court will not lend its aid in order to enforce a contract entered into with a view of carrying into effect anything which is prohibited by law.” Counsel for the respondent have argued that this case does not fall within that rule of law. They cited a class of cases which say that where a contract may be performed either in a lawful way or in an unlawful way, and if a party in the performance of his part of the contract, without the knowledge of the other party, elects to perform it in an unlawful way, he cannot be heard to allege his own wrong. I quite accept that proposition, and it is not in the least in conflict with the one to which I have been referring, because in a case of the kind suggested the contract is not *ab initio* illegal. Where there is a contract for the sale of goods which may be used either for a lawful or for an unlawful purpose, and the vendor at the time of the sale knows that they are going to be used for the unlawful purpose, the rule applicable is the same as that where the contract is *ab initio* unlawful. *Langton v. Hughes* (4) is an illustration of that class of case. There a chemist sold drugs to a brewer knowing that they were going to be used by the brewer in making beer, which was prohibited by statute. I do not agree with what I understand to be the view of Rowlatt J., because it does not seem to me that this contract was one which could have been performed in a lawful manner. It is beside the question to say that it might have been performed in a lawful manner if the defendant had had a licence. The question which we have to consider is whether,

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(1) Carth. 251, 252.

(3) 1 M. & S. 597.

(2) 1 M. & S. 593, 596.

(4) 1 M. & S. 593.

C. A. as the defendant had not a licence at the time when the
1921 contract was made, the contract is one which can be regarded
MAHMOUD as a lawful contract. I have already said that in my opinion
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I desire to refer to *Bloxsome v. Williams* (1), because I am not sure that I quite understand the language of Bayley J. If the action was for damages for breach of contract and if the contract was an illegal contract, I do not understand the language of that learned judge; it seems to me to be at variance with the established rule of law. If, on the other hand, he was treating the case as one in which the plaintiff was seeking to recover back his money on the assumption that the contract was a void contract, then it seems to me that what he said is quite intelligible, and no criticism need be directed to it. I rather gather that this latter must have been what was in his mind by the last words of his judgment: "If the contract be void as falling within the statute, then the plaintiff, who is not a particeps criminis, may recover back his money, because it was paid on a consideration which has failed." In this view of the case the suggestion by McCardie J. in *Brightman v. Tate* (2), that there is some qualification admissible to the established rule of law that the Court will never lend its aid in the enforcement of a contract which is *ab initio* illegal, has no foundation.

For these reasons in my opinion the appeal must be allowed, and judgment entered for the defendant.

I say nothing upon the question whether the respondent may have a remedy in some other form of action against the appellant, who is said to have deceived him by making a deliberately false statement. That does not arise in this case.

SCRUTTON L.J. As we are differing from the learned judge below I will express my opinion shortly in my own words. I should like to say at the start that we are not dealing here with the commercial or business merits of the plaintiff or of the defendant. If we were, there is obviously a great

(1) 3 B. & C. 232, 235,

(2) [1919] 1 K. B. 472.

deal to be said for the commercial and business merits of the plaintiff, and nothing whatever for the commercial and business merits of the defendant. We are simply dealing with the legal position of the parties.

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For public purposes and for public reasons an Order was made by the Food Controller under the Defence of the Realm Regulations, which in my view absolutely prohibited contracts being made for the sale or purchase of certain articles. The Order of June 19, 1919, provided: "Until further notice a person shall not sell any" (linseed oil) "except under and in accordance with the terms of a licence issued by or under the authority of the Food Controller." "Infringements of this Order are summary offences against the Defence of the Realm Regulations," and therefore punishable in a Court of summary jurisdiction. "All parties to the sale of" (linseed oil) "shall require all such information as may be necessary for the purpose of satisfying them that the provisions of this Order have not been contravened." Turning to the licence, the first paragraph relates to purchases of articles situate outside the United Kingdom. The second paragraph relates to sales, and there is no statement where the articles are to be situate. Para. 2 says: "Sales by you under the authority of this licence shall only be made (b) For delivery within the United Kingdom"—this particular contract is for delivery at Hull—"to persons holding a licence issued under the authority of the Food Controller authorizing them to purchase the articles sold for use in the United Kingdom." It appears to me, therefore, clear that the Order prohibits the sale of any one of the specified articles within the United Kingdom to a person who has no licence to buy it. That is unfortunately what happened in this case. The plaintiff, who had a licence to sell, sold linseed oil to the defendant, who had no licence to purchase. It is clear that an offence has been committed under the Order; an act prohibited by the Order has been done. There are cases where it has been discussed whether "knowingly" should be read into a statute; whether a person can be convicted of an offence against the statute who did not

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know that he was breaking it. It depends in each case upon the words of the statute. Where the prohibition is for public purposes as a general rule, unless there is the word "knowingly" or something to show that the offence can only be committed by a person who knows he is committing an offence, the person must take the risk. He must make such inquiries as will show him whether or not he is violating the prohibition in the statute. In this case the provisions of clause 3 of the Order seem to make it quite clear that he is required to get the information necessary to see whether he is violating the Order. There are many cases upon mens rea. The nearest I have been able to find is *Reg. v. Woodrow* (1), which turned upon a statute making it an offence for a dealer in tobacco to have in his possession tobacco in which there should be found on examination any other material. The person alleged to have infringed the statute purchased the adulterated tobacco of the manufacturer as genuine tobacco, and he honestly believed it was genuine. He was convicted, because the statute was passed for public purposes, and it was immaterial that he did not know that the tobacco was adulterated. He should have taken proper steps to see that it was not adulterated. If this contract is prohibited by what is equivalent to a statute, the fact that the person who entered into the contract honestly believed that he was not breaking the statute, because he was told by the other party that he had a licence, is no defence. I think the law is laid down in *Cope v. Rowlands* (2), where Parke B., delivering the judgment of the Court, said: "It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition: Lord Holt, *Bartlett v. Vinor*. (3) And it may be safely laid down, notwithstanding some dicta apparently

(1) (1846) 15 M. & W. 404.

(2) 2 M. & W. 157.

(3) Carth. 252.

to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract?" If the contract is prohibited by statute, the Court is bound not to render assistance in enforcing an illegal contract.

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As I understand, two reasons are given why in this case the Court should enforce this contract. First of all, it is said that the Court will not listen to a person who says, "Protect me from my own illegality." In my view the Court is bound, once it knows that the contract is illegal, to take the objection and to refuse to enforce the contract, whether its knowledge comes from the statement of the party who was guilty of the illegality, or whether its knowledge comes from outside sources. The Court does not sit to enforce illegal contracts. There is no question of estoppel; it is for the protection of the public that the Court refuses to enforce such a contract.

The other point is that, where a contract can be performed lawfully or unlawfully, and the defendant without the knowledge of the plaintiff elects to perform it unlawfully, he cannot plead its illegality. That in my view does not apply to a case where the contract sought to be enforced is altogether prohibited, and in this case to contract with a person who had no licence was altogether prohibited. It was not that the plaintiff might lawfully contract with the defendant and chance his getting the licence before the plaintiff delivered the goods. The contract was absolutely prohibited; and in my view, if an act is prohibited by statute for the public benefit, the Court must enforce the prohibition, even though the person breaking the law relies upon his own illegality. I say nothing about the cases to which Parke B. refers in *Cope v. Rowlands* (1), where the statutory prohibition is for the benefit of a particular person, and not for the benefit of the public. It may be that different rules apply to such a case, but in this case it is clear that the prohibition is for the benefit of the public.

(1) 2 M. & W. 157, 158.

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The decision of Rowlatt J. seems to have been based upon his view that there was no illegality on the plaintiff's part. For the reasons I have pointed out I think he misunderstood the Order. It was illegal for the plaintiff to make this contract. The dictum of McCardie J. in *Brightman v. Tate* (1), founded on *Bloxsome v. Williams* (2), apparently lends support to the view of Rowlatt J.

In *Bloxsome v. Williams* (2) the position was that the defendant, a horse dealer, was prohibited from trading on Sunday, but there was nothing illegal in another person making a contract with a horse dealer, except that if he knew that the person with whom he was dealing was a horse dealer and was guilty of breaking the law he might be aiding and abetting him to break the law. But merely to make a contract with a horse dealer, without knowing he was a horse dealer, was not illegal. That was pointed out by Bayley J. when he said (3): "It is not competent to the defendant to set up his own breach of the law," and it appears to me to distinguish *Bloxsome v. Williams* (2) from this case. Certainly I must not be taken as assenting to the dictum of McCardie J. (1) which is based upon *Bloxsome v. Williams*. (2)

Whether the plaintiff has a remedy against the defendant who, on the finding of the umpire, has fraudulently deceived him, is a matter on which I express no opinion. This Court is confined to an award made upon the contract, and on the contract it appears to me that the arbitrator answered the question, which he put to himself, wrongly, when he enforced a contract which was prohibited by statute for the public benefit.

For these reasons I think that the judgment of Rowlatt J. should be reversed.

ATKIN L.J. I agree. It is admitted that the Order of the Food Controller, made under the Defence of the Realm Regulations, has the effect of a statute, and the contention

(1) [1919] 1 K. B. 472.

(2) 3 B. & C. 232.

(3) *Ibid.* 235.

is that by that Order the contract in this case was prohibited. When the Court has to deal with the question whether a particular contract or class of contract is prohibited by statute, it may find an express prohibition in the statute, or it may have to infer the prohibition from the fact that the statute imposes a penalty upon the person entering into that class of contract. In the latter case one has to examine very carefully the precise terms of the statute imposing the penalty upon the individual. One may find that the statute imposes a penalty upon an individual, and yet does not prohibit the contract if it is made with a party who is innocent of the offence which is created by the statute. I prefer not to deal with the question of contracts forbidden by the common law as being contrary to public policy, because, despite the great authority of Parke B. (1), I think a question might be raised whether or not it is right to say that those contracts are prohibited by the common law. The right view may be that the common law refuses to enforce them. I think a different set of circumstances may arise in respect of such contracts as those, but here it appears to me to be plain that this particular contract was expressly prohibited by the terms of the Order which imposes the necessity of a compliance with the licence. With great respect to the learned judge, I think the underlying fallacy in his judgment is that he has not directed his attention to the terms of the licence or to the terms of the Order which says that no sale shall be made unless it complies with the terms of the licence. When one looks at the licence one finds an express prohibition against the plaintiff selling to the defendant as the latter had not a licence. I do not think it is necessary to pursue the matter any further so far as the statutory prohibition is concerned. Whether or not the plaintiff would be liable to a prosecution does not appear to me to be necessarily the same point, and I desire to abstain from expressing an opinion upon it. All I desire to say is that I myself view with some trepidation any tendency to diminish the importance of the rule as to

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(1) See *Cope v. Rowlands*, 2 M. & W. 157.

C. A. mens rea which has prevailed in respect of criminal charges.
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that an offence is created without a criminal intention on the part of the person who is charged, but those cases, where the Court is dealing with a question of crime, are to my mind in themselves anomalous ; and I should hesitate to increase their number without being satisfied upon argument that this is one of them.

The only other contention that I desire to refer to is the suggestion that there is something in the nature of an estoppel in this case. It seems to me that, when once it is appreciated that this prohibition is imposed for the public benefit, and is obviously made with the intention that the persons who are left in control of these goods shall only be entitled to deal with them if they are licensed by the proper authority and if they act in accordance with the terms of that licence, it would reduce the legislation to an absurdity to say that, notwithstanding such a statutory prohibition, if the seller is deceived into believing that his purchaser has a licence, he may then hand over the goods to that lying purchaser free from any restrictions whatever and leave him in control of the goods. The absurdity is made still greater when one appreciates that, if two rogues each mutually deceive one another, apparently the legislation could be given the go-by altogether, and there would be unrestricted dealings in these particular commodities between such persons under contracts giving enforceable rights between one and the other. I cannot conceive that that can be the law, and I think that the express statutory prohibition prevents that state of law arising.

I agree with my brothers in reference to *Brightman v. Tate*. (1). If it is to be assumed, as was decided there, that there was in that case an express statutory prohibition against entering into the particular contract, the doubts expressed by McCardie J. are unfounded.

The result is that this appeal will be allowed. The Court

should say that the umpire ought to have given effect to the defendant's contention, and that he ought not to have awarded any sum to be paid by the defendant to the plaintiff.

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Appeal allowed.

Solicitors for plaintiff: *C. J. Smith & Hudson.*

Solicitors for defendant: *Hays, Roughton & Dunn.*

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Contempt of Court—Court-martial—Publication of prejudicial Tendency—Disclosure of Sentence before Promulgation—Comments injurious to Accused—Jurisdiction of King's Bench Division to attach for—Army Act, 1881 (44 & 45 Vict. c. 58), s. 57; s. 126, sub-s. 3.

Where contempt of Court is committed against a court-martial by a person not subject to military law, the King's Bench Division has inherent jurisdiction on the application of a party to the proceedings before the court-martial who is aggrieved by the contempt to punish the person guilty of the contempt, its original jurisdiction to do so not having been affected by s. 126, sub-s. 3, of the Army Act, 1881, or otherwise.

Rez v. Davies [1906] 1 K. B. 32 applied.

Sect. 126, sub-s. 3, of the Army Act, 1881, provides a mode by which the president of a court-martial may bring a contempt of that court before the King's Bench Division or other Court of law, and it does not relate to the case in which the defendant or other party to the proceedings before the court-martial makes an application to the King's Bench Division to commit a person for contempt of the court-martial and, consequently, in a case of the latter description it is not necessary to obtain a certificate from the president of the court-martial under that sub-section.

Semble, per Avory J., where, on an application to the King's Bench Division for a rule nisi for an attachment for contempt of a court-martial, it is necessary to obtain a certificate from the president of the court-martial under s. 126, sub-s. 3, of the Army Act, 1881, the certificate in order to be effective must be obtained before the application is made.

It is a contempt of a court-martial to publish the sentence of that court before it has been duly confirmed and promulgated.

ORDER NISI for a writ of attachment.

At a general court-martial held at the Military Hospital, Rochester Row, London, S.W., on November 29, 1920, and

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at the Tower of London on December 8, 1920, Guardsman James Richard Farnsworth, 1st Battalion Irish Guards, hereinafter called "the applicant," was tried on four charges of desertion and two charges of loss of kit, to all of which he pleaded not guilty, and on all of which he was found guilty, and the sentence of the court pronounced on the latter date was that he should be imprisoned with hard labour for two years and discharged with ignominy from His Majesty's service.

On December 14, 1920, before the findings and sentence of the court-martial had been confirmed or otherwise dealt with by the confirming authority (1), or promulgated, the *Daily Mail* newspaper of that date published a statement or article, which purported to give some account of the proceedings at the said court-martial and of the doings of the applicant, and which, so far as material, was as follows :—

"RICH DESERTER.

"One Day in Army instead of 1013.

"2 Years' Hard Labour.

"Sentence of two years' hard labour has been passed on the rich young man, James Richard Farnsworth, 25, of Lumsdale, Matlock, Derbyshire, by the general court-martial held at the Tower of London last Wednesday, and exclusively reported in Thursday's *Daily Mail*.

"Farnsworth, partner in the bleaching and dyeing firm of Messrs. G. H. Farnsworth & Co., Lumsdale, appeared upon four charges of desertion and absence without leave from the Irish Guards at Caterham Barracks, Surrey, and with loss of kit. According to the prosecution, of the 2 years, 283 days, he should have been with the colours, Farnsworth spent only one day in the Service—the day he was posted to the Irish Guards at Caterham, but never reached there. He spent 30 days in civil custody, 54 days in military custody, and 21 days in hospital. In the intervening periods he was either an absentee or a deserter. . . .

"At the Tower court-martial, Capt. James, prosecuting,

(1) The officer commanding the particular district, which in this case was the London District.

said that outside Blackpool Police Court, where he was to answer a charge of desertion, Farnsworth was standing talking with his solicitor and surety, Mr. Marples, of Sheffield. He hit the latter a heavy blow with his fist, and jumped into a taxicab near by and escaped to Preston. From there he went to Carlisle and to Glasgow. From the latter place he wrote his surety, who had been ordered to forfeit 1000*l.* bail, stating that he had no money, and would meet him at an hotel outside Sheffield. Arriving there Farnsworth found to his surprise two detectives instead of a cheque. When originally he was posted to the Irish Guards, Farnsworth appealed to the commanding officer to allow him to go unaccompanied to Derby, giving his word of honour he would report at Caterham Barracks. Instead he remained in London and became well known to the West End police for his association with women of ill-repute. When he thought the military net was closing round him, he applied to the Chiswick National Registration authorities for a new registration card. It was given to him, and he presented himself for examination at the Central Recruiting Office, Whitehall. He was told then to await calling up. All this time he should have been serving in the Irish Guards. Farnsworth then went to stay at a Kensington hotel. A recruiting officer from Derby came to the hotel and noticed a bag there with the initials 'J. R. F.' He was told it belonged to Farnsworth.

"When Farnsworth returned from a dance detectives awaited him. According to his story to the court-martial he told the West London magistrate that it was arranged that if he would drop a threatened libel action against certain officers in Derby he would be allowed to return home and enlist in any regiment he liked. He was, however, sent back to the Irish Guards at Caterham. Four times Farnsworth escaped from Caterham, and it was still a mystery at the barracks how he got away."

On December 20, 1920, a confirmation of the sentence of the court-martial in the following terms was signed by the officer commanding the London District: "Confirmed. I remit six (6) months of the sentence of imprisonment.

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1921 Signed at the Horse Guards, Whitehall, London, this 20th
day of December, 1920 "

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On December 21, 1920, the promulgation of the sentence was effected by the officer commanding the 3rd Battalion Grenadier Guards signing the following : " Certificate of Promulgation. Promulgated by me and extracts taken at the Tower of London this 21st day of December, 1920. . . . "

On the last-mentioned date the applicant made an application to a Divisional Court of the King's Bench Division for, and obtained from that Court, an order nisi calling upon the editor of the *Daily Mail* to show cause why a writ of attachment should not issue against him for his contempt in printing and publishing or causing to be printed or published in the said newspaper of December 14 before promulgation of sentence certain statements concerning the said court-martial proceedings against the applicant.

The application was supported by an affidavit of the solicitor for the applicant in the court-martial proceedings, in which, after referring to the charges against the applicant, the said proceedings, and the statement published in the *Daily Mail*, he stated (inter alia) that the said article purported to be a report of sentence passed on the applicant in respect of the said charges ; that, furthermore, certain parts of the article purported to record matters proved in evidence at the court-martial which in fact were not put in evidence at that Court, to wit, the part of the article extending from the words " that outside Blackpool Police Court " down to the words " instead of a cheque," the part from the words " A recruiting officer from Derby " down to " belonged to Farnsworth," the statement that " Instead he remained in London and became well known to the West End police for his association with women of ill-repute," and the statement that " When Farnsworth returned from a dance detectives awaited him " ; that on December 14, 1920, no notice of promulgation of sentence had been received by the applicant nor by the deponent on his behalf, nor had any notice of that kind been received by either of them since that date ; and that up to the later date of making his affidavit the deponent was informed

and believed that sentence on the applicant had not been passed by the confirming authority and duly promulgated.

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On December 23, 1920, the President of the court-martial at the instance of the applicant made and signed a certificate under s. 126, sub-s. 3, of the Army Act, 1881, which, so far as material, was as follows: "I, Gilbert Claud Hamilton, Colonel commanding Grenadier Guards, hereby certify in accordance with s. 126, sub-s. 3 (1) . . . that I was President of the General Court-martial held at the Tower of London on December 8, 1920, for the trial of No. 12807 Guardsman James Richard Farnsworth, 1st batt. Irish Guards, on various charges of desertion and loss of kit, and that on December 14, 1920, the finding of the court had not been confirmed or otherwise dealt with by the confirming authority in accordance with s. 57 of the Army Act, 1881, and that the publication by the *Daily Mail* newspaper of what purported to be the sentence of the said General Court-martial on December 14, 1920, is a contempt towards the said General Court-martial in so far as it brings such court into disrepute. . . ."

On January 18, 1921, the editor of the *Daily Mail* made an affidavit in opposition to the application for an attachment, in which he stated that the paragraphs appearing in the issue of the *Daily Mail* of December 14, 1920, relating to the applicant and the court-martial at which he was charged and the sentence stated to have been passed upon him, were written by a regular member of the staff of the paper who had been present at the court-martial; that the report of the court-martial,

(1) Army Act, 1881, s. 126:
 "(3.) Where a person not subject to military law is guilty of any contempt towards a court-martial, by using insulting or threatening language, or by causing any interruption or disturbance in its proceedings, or by printing observations or using words calculated to influence the members of or witnesses before such court, or to bring such court into disrepute, the president of the court-martial may certify the offence of such person, under his hand, to any Court of

law in the part of Her Majesty's dominions where the offence is committed which has power to commit for contempt, and that Court may thereupon inquire into such alleged offence, and after hearing any witnesses that may be produced against or on behalf of the person so accused, and after hearing any statement that may be offered in defence, punish or take steps for the punishment of such person in like manner as if he had been guilty of contempt of that court."

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as to which the deponent understood no objection could be taken, appeared in the issue of the *Daily Mail* of December 9, 1920 ; that after a lapse of some days the reporter in question informed the authorities of the *Daily Mail* that he had made inquiries and ascertained that sentence of two years' hard labour had been passed upon the applicant ; that upon that the article of December 14, 1920, written by the said reporter, was published in the *Daily Mail* ; that statements as to the episodes at Blackpool Police Court had already been published in previous issues of the *Daily Mail* dated October 27 and 28, and November 4, 1920 ; that at the time when the said paragraphs were published the deponent had no knowledge, nor had he any reason for believing or suspecting, that the account of the proceedings at the court-martial was in any way inaccurate or that the sentence stated to have been passed upon the applicant had not been publicly announced ; and that the deponent desired to express his regret that, however unwittingly as far as he was concerned, the said paper should have published in the issue of December 14, 1920, any statements as to the proceedings at the said court-martial which might have been inaccurate and should have published the statement that the said sentence had been passed upon the applicant.

Sir E. Carson K.C. (H. M. Givven with him) showed cause. The order nisi should be discharged.

Assuming that the publication of the article in question constituted a contempt of the court-martial, this Court has no jurisdiction to deal with the matter. The King's Bench Division of the High Court has not and never had any inherent jurisdiction to protect a court-martial against contempt of Court or to punish a person committing that offence. No previous case can be found in which this Court has ever assumed jurisdiction to do so. If this Court had possessed inherent jurisdiction of that kind, it would have been unnecessary to enact the statutory provision to be presently mentioned, which expressly gives this Court power to deal with contempt of a court-martial provided the procedure thereby prescribed

be followed. It is true that in Hawkins' Pleas of the Crown, Bk. 2, ch. 3, ss. 3 and 4, it is stated that the Court of King's Bench is entrusted with the highest jurisdiction over all misdemeanours of a public nature ; and that it is the *custos morum* of all the subjects of the realm, and wherever it meets with an offence of dangerous consequence to the public it will adopt a suitable punishment. It further appears from the cases of *Rex v. Parke* (1) and *Rex v. Davies* (2) that this Court has jurisdiction to restrain or correct any inferior court which acts without authority, and also a correlative jurisdiction to protect these courts against contempt in so far as they have no power to protect themselves. These authorities do not, however, show that this Court has jurisdiction to deal with contempt of a court-martial. The cases of *Rex v. Parke* (1) and *Rex v. Davies* (2) have no application to the present case. They relate only to inferior courts which are ordinary tribunals of the land and courts of record ; whereas a court-martial is a statutory court specially created and is not a court of record. The jurisdiction to correct and to protect inferior courts is a part of the prerogative of the Crown which was entrusted to the Court of King's Bench, and it related to offences, including contempt of Court, which were known to the common law. In Hawkins' Pleas of the Crown, Bk. 2, ch. 3, s. 6, it is stated that where a statute creates a new offence it seemed questionable how far the Court of King's Bench had an implied jurisdiction in such a case. The doubt there expressed has since been settled, and it has been decided that where Parliament has provided by statute for powers previously within the prerogative being exercised in a particular manner they can only be so exercised : *Attorney-General v. De Keyser's Royal Hotel* (3) per Lord Atkinson (4) adopting the statement of Swinfen Eady M.R. (5) There are many statutes which contain provisions for the regulation or protection of inferior courts, and which, therefore, so far as they go, exclude the inherent jurisdiction of this Court to deal with these matters.

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(1) [1903] 2 K. B. 432.

(3) [1920] A. C. 508.

(2) [1906] 1 K. B. 32.

(4) *Ibid.* 538.

(5) [1919] 2 Ch. 197, 216.

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Even if this Court had inherent jurisdiction to deal with contempt of a court-martial, that jurisdiction is now excluded by the Army Act, 1881, s. 126, sub-s. 3 (1), which prescribes the only method by which contempts of that kind can now be dealt with, and gives the fullest power of dealing with these contempts, provided the prescribed procedure be followed. The sub-section enacts that where a person not subject to military law is guilty of any contempt towards a court-martial, the president of the court-martial may certify the offence of that person, under his hand, to any Court which has power to commit for contempt. The Act only treats this Court as having jurisdiction in respect of a contempt of a court-martial where a certificate of the president has been obtained. Thus, s. 129, sub-s. 2, provides that where counsel is guilty of a contempt the offence shall be deemed to be within s. 126, and the president may certify it to a court of law. If in this instance a contempt of court was committed, the proper course for the applicant to take was not himself to apply to this Court for a writ of attachment, but to call the attention of the president of the court-martial to the contempt and leave it to him to certify the offence to this Court and take further proceedings under that section, or at all events the applicant before himself applying to this Court should first have obtained from the president a certificate to this Court. In the present case the procedure prescribed by s. 126 was not followed, no certificate from the president of the court-martial to this Court having been obtained before the application for the order nisi was made, and this Court has therefore no jurisdiction to deal with the matter under the Act. It is understood that since the application for the order nisi the applicant has obtained a certificate from the president, but that certificate cannot now avail the applicant and it ought not to be admitted in evidence. In no previous case of an application for a rule for an attachment for contempt of court has further evidence been admitted after the rule nisi was granted.

There was no contempt of the court-martial in this case, or at all events no such contempt as to call for the interference

of this Court. No part of the article in question constituted a contempt or at least a substantial contempt. The article in so far as it published the sentence of the court-martial before it had been confirmed cannot be regarded as a serious contempt. It correctly published the sentence as originally pronounced, and the sentence was afterwards confirmed with a reduction of only one-fourth of its amount. As to those parts of the article which purport to record matters not given in evidence at the court-martial, it is to be observed that it is not stated in the article that these matters were given in evidence in that court. Most of these matters had already been mentioned elsewhere, and they were only referred to in the article because it was supposed that the case was at an end and that the trial could no longer be prejudiced. If one or two of the statements, such as the allegation that the applicant became known to the West End police, were not supported by any evidence, they were not in the circumstances of so grave a character as to deserve punishment by this Court. At the time when the article was published the court-martial was *functus officio* and had ceased to exist, and therefore no contempt of that court could any longer be committed. If, on the other hand, the court-martial continued to exist until its sentence was confirmed, as is said to be shown by r. 51 of the Rules of Procedure, 1907, set out in the Manual of Military Law, ed. 1914, p. 603, then the applicant should have followed the procedure prescribed by s. 126, sub-s. 3, of the Act and obtained a certificate from the president, and as he has not done so his application must fail. In view of the explanation and expression of regret by the editor in his affidavit, he ought not to be held personally responsible for the publication of the article.

C. M. Kohan, in support of the order nisi. The order nisi should be made absolute. This Court has jurisdiction, on the application of a party to proceedings before a court-martial, to protect that court against contempt of Court by a person not subject to military law, and to punish the person guilty of the contempt.

The King's Bench Division has always had jurisdiction to

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correct all inferior courts by certiorari, prohibition and habeas corpus, and it has a correlative jurisdiction to protect these courts against unauthorized interference: *Rex v. Parke* (1); *Rex v. Davies*. (2) A court-martial is an "inferior" court within the meaning of these decisions. It would not be reasonable to say that the jurisdiction of this Court, which undoubtedly applies to many inferior courts, did not apply to all of them. This Court has always had jurisdiction to supervise courts-martial and to restrain by the writs already mentioned any unauthorized action by these courts affecting civil as distinct from military rights: *Grant v. Gould* (3); *In re Mansergh* (4); and see Manual of Military Law, ed. 1914, pp. 121-125. According to the principle laid down in *Rex v. Davies* (2) it therefore follows that this Court has a correlative jurisdiction to protect a court-martial against contempt of court and to punish the person guilty of the contempt, and it ought to exercise that jurisdiction at the instance of a party to the court-martial proceeding who is prejudiced by the contempt whenever it is in the interests of justice to do so. That jurisdiction of the King's Bench Division is not excluded or otherwise affected by s. 126, sub-s. 3, of the Army Act, 1881, which provides that where a person not subject to military law is guilty of any contempt towards a court-martial, the president of the court-martial may certify the offence to any Court of law having power to commit for contempt, and that Court may inquire into the alleged contempt. That sub-section is merely permissive and not mandatory, providing that the president "may," not that he "must," certify the offence, and therefore it is not inconsistent with the inherent jurisdiction of this Court. The sub-section is intentionally so framed as not to exclude the jurisdiction of this Court, as otherwise it would inflict hardship upon an aggrieved person, who might not be able to induce the president of the court-martial to grant a certificate. It provides a soldier whose trial before a court-martial is interfered with by a civilian with an alternative remedy by

(1) [1903] 2 K. B. 432.

(2) [1906] 1 K. B. 32.

(3) (1792) 2 H. Bl. 69.

(4) (1861) 1 B. & S. 400.

enabling him to bring the matter before the president of the court-martial so that the latter may certify it to a civil Court, but it does not curtail the prerogative of this Court to deal with contempts of inferior courts. It cannot have been intended that the right to decide whether or not there has been a contempt of court should be taken away from this Court and vested exclusively in the president of the court-martial. The Act creates no new offence. Further, the sub-section only applies where an application to this Court or to some other Court having the necessary jurisdiction to punish the contempt is made by the court-martial itself, or its president, and it does not apply where, as in the present case, the application is made by a party to the court-martial proceedings. Moreover, the sub-section only applies down to the time when the court-martial pronounces sentence, because that court is then *functus officio*, and it is no longer possible for its president to certify a contempt, and the sub-section cannot therefore exclude the jurisdiction of this Court to punish a contempt committed, as this was, after sentence had been pronounced. In case it should be held that s. 126, sub-s. 3, applies in this case, the applicant, since the order *nisi* was granted, has obtained a certificate from the president of the court-martial, and he now makes formal application to this Court to act upon the certificate: see *Manual of Military Law*, ed. 1914, p. 496.

[LORD COLERIDGE J. As the document has not yet been verified by affidavit, this Court cannot now accept it as a certificate of the president of the court-martial, but if it is verified before the conclusion of the argument of the order *nisi*, the Court will accept it as a certificate and consider it. (1)]

The publication of the article in question constituted a contempt of the court-martial. The court-martial does not cease to exist when its sentence is pronounced, but continues until the sentence is confirmed and promulgated: see s. 54; and, indeed, that court consists not only of the tribunal which tries the case but of that tribunal and the confirming authority

(1) The certificate was duly verified and put in evidence.

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together ; and, consequently, the fact that the article was published after the sentence of the court had been pronounced and before it was confirmed did not prevent it from being a contempt of the court. The article contains several statements each of which amounts to a contempt of the court-martial of a substantial character. The announcement of the sentence of the court-martial before it had been confirmed was a serious contempt. Every member of the court-martial takes an oath in the form set out in s. 52, sub-s. 1, of the Act of 1881, as amended by s. 6 of the Army (Annual) Act, 1918 (8 Geo. 5, c. 6), by which he swears that, except as therein provided, he will not divulge the sentence of the court until it is confirmed. The sentence was thus required to be kept absolutely secret until it was confirmed, and those who obtained it and published it in this article committed a flagrant contempt of the court-martial to the prejudice not only of the court itself but also of the applicant. As to the other statements in the article, purporting to record matters given in evidence at the court-martial, it appears from the affidavit of the applicant's solicitor that many of these statements, of a character highly injurious to the applicant, were not given in evidence during the court-martial proceedings, and, so far as these proceedings are concerned, they must therefore be regarded as unproved and untrue. The publication of the article tended to interfere with the confirming authority by making the sentence known to the public at large and by prejudicing the character of the applicant. The fact that an article containing these unauthorized and untrue statements was allowed to be published shows that there was negligence on the part of those responsible for its publication. No modification of or apology for the article was afterwards published in the newspaper. The statement by the editor in his affidavit that at the time when the article was published he had no knowledge and no reason for suspecting that it was in any way inaccurate or that the sentence had not been publicly announced, offers no sufficient excuse for the publication of the article : *Metropolitan Music Hall Co. v. Lake* (1) ;

(1) (1889) 58 L. J. (Ch.) 513.

American Exchange in Europe v. *Gillig* (1); *Grimwade* v. *Cheque Bank* (2); and *Vizetelly* v. *Mudie's Select Library*. (3)
Sir E. Carson K.C. replied.

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LORD COLERIDGE J. The question in this case is whether a writ of attachment or other process should be issued against the editor of the *Daily Mail* for contempt of Court in publishing on December 14, 1920, words relating to the applicant which, it is alleged, were calculated to interfere with the due administration of justice in a court-martial before which the applicant was the party accused.

The first point is whether this Court has any inherent jurisdiction over courts-martial in the matter of contempt. We were referred to an ancient authority, Hawkins' Pleas of the Crown, which in Bk. 2, ch. 3, s. 3, dealing with the Court of King's Bench, contains this language: "It is certain, that this Court is intrusted with the highest jurisdiction, not only over all capital offences, but also all other misdemeanours whatsoever of a public nature, tending either to a breach of the peace, or to the oppression of the subject, ..." Sect. 4 declares: ". . . this Court being the custos morum of all the subjects of the realm, wherever it meets with an offence contrary to the first principles of common justice, and of dangerous consequence to the public, if not restrained, will adapt such a punishment to it as suitable to the heinousness of it." That this Court will exercise its jurisdiction over such a court as a court-martial in order to restrain or correct it, where it purports to act without authority or in excess of its authority, by prohibition, or by certiorari, and in matters of habeas corpus, is not denied. Nor is it denied that this Court has jurisdiction to deal with matters of contempt of all inferior courts, and even of committing justices before committal, when the case is or may be remitted to a Court of record. No Court other than this Court has inherent power to protect itself against contempt by proceedings for attachment or otherwise except where that power is given it by

(1) (1889) 58 L. J. (Ch.) 706.

(2) (1897) 13 Times L. R. 305.

(3) [1900] 2 Q. B. 170.

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statute. A court-martial has no inherent power apart from statute to protect itself by such proceedings, but, if this Court can interfere with the proceedings of a court-martial to check irregularities by that court, it seems to me that it must also be clothed with inherent jurisdiction to protect a court-martial from contempt calculated or tending to obstruct the administration of justice in that court, unless the Army Act, 1881, which regulates the proceedings by courts-martial, has by s. 126, sub-s. 3 (1), so dictated the procedure to be observed by that court in cases of contempt as to oust the jurisdiction of this Court in such cases where the procedure described therein has not been followed. I am of opinion, on the authority of *Rex v. Davies* (2), that if the Army Act did not exist this Court would have inherent jurisdiction in the matter of contempt in the case of a court-martial.

The next point is whether the Army Act, 1881, by s. 126, sub-s. 3, has limited this inherent jurisdiction and confined it to cases where the president of the court-martial has issued a certificate to this Court under the provisions of that section. The section enacts as follows: "Where a person not subject to military law is guilty of any contempt towards a court-martial, by using insulting or threatening language, or by causing any interruption or disturbance in its proceedings, or by printing observations or using words calculated to influence the members of or witnesses before such court, or to bring such court into disrepute, the president of the court-martial may certify the offence of such person, under his hand, to any Court of law in the part of Her Majesty's dominions where the offence is committed which has power to commit for contempt, and that Court may thereupon inquire into such alleged offence, and after hearing any witnesses that may be produced against or on behalf of the person so accused, and after hearing any statement that may be offered in defence, punish or take steps for the punishment of such person in like manner as if he had been guilty of contempt of that court." The power to deal with contempt of Court is a prerogative of the Crown, the exercise of which is entrusted

(1) See note (1) ante, p. 737.

(2) [1906] 1 K. B. 32.

to this Court. Unquestionably Parliament can abate by statute all or any portion of the prerogative. We were much impressed by the passage in the judgment of the late Master of the Rolls, Lord Swinfen (1), quoted and approved of by Lord Atkinson in the case of *Attorney-General v. De Keyser's Royal Hotel, Ltd.* (2) The passage is this: "Those powers which the executive exercises without parliamentary authority are comprised under the comprehensive term of the prerogative. Where, however, Parliament has intervened and has provided by statute for powers, previously within the prerogative, being exercised in a particular manner and subject to the limitations and provisions contained in the statute, they can only be so exercised. Otherwise, what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative?" The Army Act, 1881, confers upon a court-martial a simple and efficient mode of bringing matters of contempt before this Court. If the court-martial itself wishes to enforce contempt against its authority it must do so under the provisions of the Act. In this case, however, the law is not put in motion by the court-martial itself. It is set in motion by the person accused in a case before that court, who asserts that language relating to the case has been printed and published which is calculated to obstruct the due administration of justice in that court. I see nothing in the Army Act to take away the right of a person so aggrieved to apply to this Court, or to take away our jurisdiction to hear him and adjudicate upon his case. To hold otherwise would be to make the right of an aggrieved person depend upon the discretion of the president of the court-martial. Clear and specific language alone would abolish that person's right, and, in my opinion, s. 126, sub-s. 3, of the Army Act, 1881, is limited to those cases where the court-martial at its own instance seeks the protection of this Court.

The next point is whether this is or is not a case of contempt of Court. The article in question, to put it shortly, states that "Sentence of two years' hard labour has been passed" on

(1) [1919] 2 Ch. 197, 216.

(2) [1920] A. C. 508, 538.

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To make public that which should be secret may be seriously to interfere with the free action of that officer. It is no answer to say that the officer was not in fact so influenced. It is sufficient contempt if the publication was calculated or tended to interfere with his free action or decision. In regard to the statements in the article as to the appellant hitting his surety, and so forth, these statements, even if they were true in fact and had been given in evidence before some other Court, were false in this sense, that they were set forth as having been given in evidence at the court-martial, whereas no such evidence was produced before that court, and that being so the publication of these statements was a contempt and the fact that they may have been mentioned in evidence on some other occasion is no answer to the gravamen of the charge. In regard to the third matter—namely, the statement as to the applicant being well known to the West End police for his association with women of ill-repute—no evidence, either before the court-martial or in any form of proceeding, had any reference to any such habits on the part of the applicant. In regard to these statements, which convey a false impression as to the character of the accused, no opportunity was or could be afforded to him, in the interval between the sentence and its final promulgation, of challenging before the court the truth of these statements. In this Court in meting out sentences on criminals after conviction judges are often, and rightly, influenced in passing such sentences by police or other reports as to the character and antecedents of the criminals. These are given in open court with full opportunity of criticism or dispute. Here the published statements which are defamatory of the accused, unconnected in some instances with the crime alleged, unproved and possibly false, might easily tend to prejudice his case, and would be calculated seriously to thwart and interfere with the due administration of justice.

All these conclusions are arrived at on the supposition that a certificate of the president of the court-martial is unnecessary to the decision in this case. Where on an application for a rule nisi the certificate is necessary, its production is made

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and would be a condition precedent to the right to obtain the rule nisi. In such a case I should have some difficulty in coming to the conclusion that a certificate like that here given, which is of a limited extent, inasmuch as it only refers to the matter as calculated to bring the court into disrepute, and which was produced for the first time on the hearing of the rule, could make up for the absence of the existence of a certificate at the time when the rule nisi was obtained. It is not, however, necessary to decide that point in this case.

On the whole, therefore, I have come to the conclusion, first, that there was a contempt of the court-martial; secondly, that this Court has jurisdiction to entertain an application in respect of that contempt; and, thirdly, that the certificate of the president of the court-martial in this case was unnecessary. For all these reasons I am of opinion that this rule nisi should be made absolute.

AVORY J. Two questions of law have been raised for our decision in this case.

The first question is whether this Court has jurisdiction to deal with a contempt of court alleged to have been committed in the course of proceedings at a trial by court-martial of offences against military law under the Army Act, 1881, that is to say, while the finding and sentence are under consideration by the confirming authority and before the sentence is promulgated. The second question is whether, if this Court has jurisdiction to deal with the contempt committed before a court-martial, the certificate of the president of the court-martial under s. 126, sub-s. 3 (1), of the Army Act is a condition precedent to the exercise of that jurisdiction.

Upon the first question it appears to me, having regard to the decision of this Court in *Rex v. Davies* (2), it resolves itself into a question whether a court-martial is an inferior court within the meaning of that judgment. If it is, then that decision applies, and this Court has jurisdiction. Upon that question I desire to refer to one or two passages

(1) See note (1) ante, p. 737.

(2) [1906] 1 K. B. 32.

in the judgment of the Court as delivered by Wills J. It is clear from the judgment (1) that the learned judge was giving the decision of the Court upon the general question whether it has jurisdiction to deal with a case of contempt committed before or in the course of proceedings in any inferior court. After referring to Lord Coke's Fourth Institute, c. 7, and to Hawkins' Pleas of the Crown, Bk. 2, c. 3, which has been referred to by my Lord, and the passage from which I need not repeat, Wills J. said (2) that these authorities "do serve to show the very great trust reposed in the Court of King's Bench in respect of its control and superintendence of all inferior courts, and that it is in a special manner the guardian and protector of public justice throughout the Kingdom." (2) He further says (3), quoting from a judgment of Bowen L.J. : "The object of the discipline enforced by the Court in case of contempt of Court is not to vindicate the dignity of the Court or the person of the judge, but to prevent undue interference with the administration of justice." After referring to the authorities relating to contempts in the nature of attacks upon judges he said (4) : "With a few verbal alterations those eloquent words will apply with at least equal force to writings, the direct tendency of which is to prevent a fair and impartial trial, or at least one that can be so considered, from being had in courts of inferior jurisdiction which have not the power of protecting themselves from such encroachments upon their independence." (4) Again, he said (5), after referring to the exercise by the superior Courts of that power : "This, however, as it seems to us, was only one exercise of the duty of seeing that they did impartial justice, and if and when the attainment of that end required that the misdeeds of others should be corrected as well as the misfeasances of the inferior courts themselves, it seems to us that it is no departure from principle, but only its legitimate application to a new state of things, if others whose conduct tends to prevent the due performance of their duties by those

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(1) [1906] 1 K. B. 32, 37.

(3) [1906] 1 K. B. 40.

(2) Ibid. 38.

(4) Ibid. 41.

(5) Ibid. 43.

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courts have to be corrected as well as the courts themselves." (1) The result of that judgment is to show that wherever and whenever this Court has power to correct an inferior court, it also has power to protect that court by punishing those who interfere with the due administration of justice in that court. It is admitted that this Court always has had jurisdiction to correct courts-martial either by the process of certiorari or by prohibition, and, that being so, it appears to follow from this judgment in the case of *Rex v. Davies* (2) that the Court also has power to protect a court-martial by punishing those who interfere with the due administration of justice in it.

Upon the second point, whether the certificate of the president of the court-martial under s. 126 is a condition precedent to the exercise of the jurisdiction of this Court, it is clear that a court-martial has not, and never had, any power to protect itself by punishing for contempt of court, committed either in the face of the court or otherwise. The argument of Sir Edward Carson upon s. 126 requires careful consideration, as indeed any argument of his always does. That argument, as I understand it, is that s. 126 must be read as imposing a limitation upon the jurisdiction of this Court to deal with contempt committed in the course of a trial before the court-martial, and he relies in support of that argument upon the passage which has been read by my Lord from the case of *Attorney-General v. De Keyser's Hotel*. (3) If a court-martial had, prior to the Army Act, 1881, exercised or claimed to exercise the power to deal with contempt of court, the principle explained in the passage which has been quoted would apply, and the statute would impose a limitation on that power, but I am at a loss to see how this section can be said to curtail or impose any limitation upon the pre-existing jurisdiction of this Court. The argument assumes that this Court had that pre-existing jurisdiction, and in that respect and to that extent it is inconsistent with the argument on the first point. So far from this section imposing any limitation on the

(1) [1906] 1 K. B. 43.

(2) [1906] 1 K. B. 32.

(3) [1920] A. C. 508, 538.

jurisdiction of this Court, it appears to me merely to confer on the president of the court-martial a new power which neither he nor the court-martial had before—namely, the power of remitting to this Court a case of contempt which the court-martial cannot itself deal with. I find in that section no provision either express or implied which takes away the right of a party to proceedings before a court-martial who is aggrieved by a contempt of that court to move this Court to exercise the inherent jurisdiction which it possesses over all inferior courts.

With regard to the certificate which has been produced during the course of the argument of this case, I desire, speaking for myself, to say that if in this case a certificate were necessary for the exercise of the jurisdiction of this Court, a certificate obtained after the rule nisi had been moved for and granted would be ineffective. In my opinion, where a certificate is necessary, it must, in order to be relied upon, be granted before the rule nisi is moved for, and if a certificate is not granted before that stage the obtaining of one afterwards cannot cure the defect.

In regard to the question whether there has been a contempt of court, I agree entirely with what my Lord has said. I would only refer to s. 52 of the Army Act, 1881, which requires that every member of the court shall take an oath not to divulge the sentence of the court until it is duly confirmed, and to s. 54, sub-s. 6, which is in these words: "Subject to the provisions of this Act with respect to the finding of acquittal, the finding and sentence of a court-martial shall not be valid except in so far as the same may be confirmed by an authority authorized to confirm the same." In this case the reporter who is said to be responsible for what appeared in this issue of the *Daily Mail* was himself present at the court-martial, as appears by the affidavit filed by the editor. Being present at that court-martial he must have been aware, or ought to have been aware, of the oath of secrecy under which the members of the court were not to divulge this sentence. As my Lord has said, the obtaining by the reporter of information as to what this sentence was supposed to be must obviously

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be reprehensible in the last degree. There is nothing in the affidavit of the editor to show in what way the reporter obtained it. The editor merely says that the reporter having obtained that information he thought he was justified in publishing it. The editor ought to have known that if the reporter had obtained it he must have obtained it improperly, and he might at least have required some explanation as to the source from which the information was obtained. I agree, therefore, that there has been contempt.

SALTER J. I am of the same opinion, and I agree that in this case, at any rate, one ought to take the facts as they existed when the rule was granted.

On the first question with which Mr. Justice Avory has dealt, the question, namely, as to the jurisdiction of this Court, I have nothing to add.

The second question is, in substance, whether s. 126, sub-s. 3, of the Army Act amounts to an enactment that for the future the King's Bench Division shall not deal with contempt of a court-martial except on the invitation of the president, and according to the procedure therein provided. It is of the last importance to assert and maintain the inherent jurisdiction of this Court to protect the administration of justice in all the inferior courts, unless Parliament has shown a plain intention to restrict that jurisdiction. Sect. 126, sub-s. 3, provides a simpler and speedier method than the procedure by rule nisi by which the court-martial itself through its president may obtain the protection of this Court. It does not, in my opinion, take away the right of an accused person, who fears that his fair trial may be prejudiced, of applying to this Court by way of rule nisi. The matter which is prejudicial to a fair trial may be published while the accused is awaiting trial and before the court-martial has been constituted. It can hardly be doubted that in such a case the accused would not be prevented by the Act from applying to this Court by rule nisi, and I see no indication that Parliament intended to take away his right to do so after the Court had been constituted. So far from showing any intention to restrict the jurisdiction of this

Court the sub-section seems to me to show an intention to facilitate its exercise.

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LORD COLERIDGE J. The judgment of the Court is that the editor of the *Daily Mail* is fined 200*l.* with costs as between solicitor and client.

Order absolute.

Solicitors for the *Daily Mail* : *Lewis & Lewis.*

Solicitors for applicant : *Redfern & Langford.*

J. R.

[IN THE COURT OF APPEAL.]

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March 9.

Landlord and Tenant—Dwelling House—Recovery of Possession—"Rent" payable in Respect of Tenancy—Increase of Rent, &c. (Restrictions), Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12, sub-s. 7.

Sect. 12, sub-s. 7, of the Increase of Rent, &c. (Restrictions), Act, 1920, provides that "where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed." The plaintiff in 1916 let a dwelling house to the defendant at a rent of 30*l.* a year, the landlord paying rates and taxes. The rateable value of the premises was 40*l.*, and the rates and taxes amounted to 31*l.* 18*s.* a year. In an action by the plaintiff for recovery of possession, after the tenancy had been determined by notice:—

Held, that "rent payable" meant the rent which the tenant had to pay, and not the net amount which the landlord got after paying the rates and taxes. Upon this construction, the "rent payable" not being less than two-thirds of the rateable value, the Act applied to the tenancy, and the plaintiff was not entitled to an order for possession.

APPEAL from a decision of Lush J.

On July 12, 1916, the plaintiff let to the defendant a dwelling house on a monthly tenancy at a rent of 2*l.* 10*s.* per month, or 30*l.* a year. The plaintiff verbally agreed to pay rates and taxes. In 1919 the rates and taxes amounted to 31*l.* 18*s.* a year. The rateable value of the premises on August 3, 1914,

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was 40*l.* In June, 1920, the plaintiff gave the defendant one month's notice to terminate the tenancy on July 12, 1920. The defendant refusing to go out, the plaintiff brought an action to recover possession.

The defendant contended that he was entitled to remain in possession as statutory tenant under the provisions of the Increase of Rent, &c. (Restrictions), Act, 1920. Sect. 12, sub-s. 7, of that Act provides: "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy." The plaintiff contended that the word "rent" in that sub-section did not mean the rent actually reserved by the instrument of tenancy, but the real or net rent after deducting the rates and taxes, so that the rent which the tenant paid in this case was less than two-thirds of the rateable value of the premises and the Act did not apply.

Lush J. held that "rent" meant rent in the ordinary meaning of the word, and he gave judgment for the defendant. The plaintiff appealed.

E. Foà for the appellant. The "rent payable in respect of the tenancy" in this sub-section means the net rent—i.e., after deduction of rates and taxes. The object of the provision was to protect landlords in the case of benevolent tenancies, that is where tenants have been allowed to remain in possession at very low rents. The sub-section compares "rent payable" with "rateable value," a comparison which involves in each branch of it the deduction of rates and taxes, otherwise like will not be compared with like, because rateable value is based on the rent free from all rates and taxes.

Sect. 2, sub-s. 6, of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, provided that "Where the standard rent payable in respect of any tenancy of a dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy. . . ." That was altered by s. 7 of the Courts (Emergency Powers) Act, 1917, which enacted that the word "standard" should

be omitted from s. 2, sub-s. 6, of the Act of 1915. Then came s. 12, sub-s. 7, of the Act of 1920, which embodied the alteration thus effected. It is submitted that "rent" in that sub-section means rates and taxes deducted. Lush J. thought he was bound to hold as he did by the decision of Bray J. in *Westminster and General Properties and Investment Co. v. Simmons* (1), but that decision does not govern the present case.

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The expression "net rent" occurs only twice in the Act. It is defined in s. 12, sub-s. 1 (c), and it is used in s. 2, sub-s. 1 (c) and (d). The word "rent" is not necessarily used in the same sense throughout the Act.

Sheffield Waterworks Co. v. Bennett (2) shows that the word "rent" in an Act of Parliament may be construed as I submit it ought to be in this Act of 1920.

[He also referred to *Waller & Son v. Thomas*. (3)]

There is sufficient ambiguity in s. 12, sub-s. 7, to enable the Court to say which is the more reasonable construction, and to adopt the one which I suggest.

G. S. Sanders for the respondent was not called upon to argue.

LORD STERNDALÉ M.R. This appeal from Lush J. raises a question as to the construction of s. 12, sub-s. 7, of the Rent Restriction Act of 1920 (10 & 11 Geo. 5, c. 17). [The Master of the Rolls read the section and continued:] I am not going to discuss the general meaning of the section. It has nothing to do with the question before the Court. The particular question before us is: in the circumstances of this particular case what is the "rent payable in respect of the tenancy" of this dwelling house?

The facts are these. The rateable value of the house is 40*l*. The rent, speaking in popular language, by which I mean the amount which the tenant when he went in agreed to pay, is 30*l*. The landlady, however, pays the rates, and they amount to more than the 30*l*. which she receives from the tenant, and therefore what comes into her pocket is nothing,

(1) (1919) 35 Times L. R. 669.

(2) (1873) L. R. 7 Ex. 409; 8 Ex. 196.

(3) (1921) 37 Times L. R. 325.

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in fact a certain amount goes out, and she is really about 30s. a year worse off by the transaction. Naturally she wishes to determine the tenancy, as she would have been able to do, but for this Act. But it is said by the tenant that she is not entitled to do so, because the rent which is really payable is not less than two-thirds of the rateable value. On the other hand it is contended by the plaintiff that the Act does not apply, because what is received by the landlady as the net result of the transaction is nothing—in fact is a minus quantity; and therefore it is contended that the rent is less than two-thirds of the rateable value of the house. It is said that in order to see what the rent is you must look at what is the net result of the transaction; or, to put it in another way, the rent is the amount received by the landlord less the deduction for rates and taxes. I cannot agree with that contention. Lush J. could not agree with it and I think he was right. Of course, unless one is to disregard altogether the ordinary meaning of language, it is obvious that “rent payable” means the rent which the tenant has to pay, and does not mean the net amount which, on the ascertainment of the result of the whole transaction, remains in the landlord’s pocket. But it is said that that ought to be so in this case, and the only argument that has at all impressed me on the matter is this. It is said that the rent has to be compared with the rateable value, and as the rateable value is the net rateable value—namely, the amount less rates and taxes—therefore the rent ought to be regarded in the same way. I think, if I may say so, that it would have been a very reasonable provision for the Legislature to have made, that the two things should be comparable—but the question is whether the Legislature has said so. We must take the framers of the Act to have had some knowledge of what in ordinary parlance “rent” means. They have in their definition section stated the meaning that they attach to “standard rent” and to “net rent,” which are both artificial expressions, but they have not in any part of the Act defined what is meant by “rent”; and I think, that being so, there is good ground for thinking that they started with the idea that “rent,” unless there was something to alter its

meaning, meant rent as ordinarily understood, and there undoubtedly are provisions in the statute in which it does mean rent as ordinarily understood. I do not know of any in which it does not. It is to be observed that the section does not speak merely of "rent," but of "rent payable in respect of the tenancy"—not "value received in respect of the tenancy," but "rent payable in respect of the tenancy"; and the rent payable in respect of the tenancy is 30*l*. That is what the tenant agreed to pay. It is quite true that it is not what the landlord or landlady, on the net result of the whole transaction, gets, but it is the rent which the tenant has agreed to pay, which is in my opinion "the rent payable in respect of the tenancy." I cannot find anything in the Act which enables us to attach any other meaning to the words of the section. We were referred to *Sheffield Waterworks Co. v. Bennett* (1), which seems to me not to touch this case at all; because, what was held there was that in that particular case "rent" must be taken to mean "annual value." That was arrived at by a reasoning very much derived from earlier Acts with respect to the supply of water, general Acts which had to be read with a Special Act, in which obviously "annual value" was intended. That does not give us any guidance at all. Some guidance, I think, but not very much, may be obtained from a decision of Bray J. in *Westminster and General Properties and Investment Co. v. Simmons* (2), in which the word "rent" was interpreted as I interpret it here. I do not think the case affords much guidance, because it was decided on a different section of a different Act. I decide the present case on this ground, that anybody, having regard to ordinary language, would say that the rent payable here was 30*l*., and that that must be taken as the meaning of the word unless there is something in the Act which shows that it is not to be so construed.

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SCRUTTON L.J. This is one of the now very numerous cases in which it has been made plain to the Court that the Rent Restrictions Act was drafted and passed through

(1) L. R. 7 Ex. 409; 8 Ex. 196.

(2) 35 Times L. R. 669.

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Parliament without any very careful consideration of how its provisions would apply in the ordinary transactions of life. The facts here are very short. The tenant has a tenancy at 30*l.* a year or 50*s.* a month, the landlord paying rates and taxes, and owing to the very heavy increase of rates, which everybody in England is subject to at present, the landlady finds herself receiving 30*l.* a year rent and paying out 31*l.* 10*s.* in rates, which is not a very profitable transaction for her; and she accordingly served a notice to determine the tenancy. She was met by the tenant with the answer: Under the Rent Restrictions Act you cannot determine the tenancy except in the specified cases mentioned in s. 5, none of which you prove in this case. The landlady answers: The Act does not apply, because the rent payable in respect of your tenancy is less than two-thirds of the rateable value. Now the rateable value (as to which it is interesting to notice that Parliament, when they drafted the Act, omitted to say whether they meant gross or net rateable value—there had to be a decision to settle that)—the rateable value is 40*l.* a year; and 40*l.* a year is the value to the landlord, the tenant paying rates and taxes. 30*l.* is not less than two-thirds of the rateable value, and on that being pointed out to the plaintiff she replies: “The rent payable does not mean the sum that you pay, but the net sum that I receive; otherwise you will be comparing rateable value, where the tenant pays rates and taxes, with rent where the landlord pays them; and Parliament cannot have meant that.” Having heard a number of cases on this Act I do not think Parliament very carefully thought out the consequences which would follow from these provisions. It is common knowledge that when the Act was introduced in respect of small dwelling houses the grievance that was to be met was that large numbers of tenants of small dwelling houses were finding their rent increased very rapidly and arbitrarily, and, owing to the shortage of houses due to the war and other circumstances, there was no competition to protect the tenant; the tenant practically had to pay what the landlord demanded, or go into the street; and so Parliament passed the Act to restrict the increase of the rent of small dwelling houses, and

it was undoubtedly thinking of the increase that the landlord asked the tenant to pay, not of anything connected with the landlord's pocket. Sect. 2, sub-s. 6, of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, provided: "Where the standard rent payable in respect of any tenancy of a dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply. . . ." It took a year and a half to find out that that clause was nonsense. The standard rent is the rent which was paid in August, 1914, and when you talk about "Where the standard rent payable in respect of any tenancy of a dwelling-house is less than two-thirds of the rateable value thereof," if you mean the rent that was payable in August, 1914, you would exclude all the benevolent tenancies created afterwards in which people were allowed during the war to stay in the house on the payment of a very small rent indeed, because the charitable rent they were paying would not be the standard rent: the standard rent was what was payable in August, 1914, and if the tenancy began after August, 1914, they would not come within this sub-section at all, and so, in 1917, an Act was passed which struck out the word "standard" from that clause. That seems to me the explanation of the clause in the Act of 1915; and I think that in argument a reliance has been placed upon it which is not justified by its terms.

Then one comes to the Act of 1920, which extended the provisions as to restriction of rent to a very large number of other houses, and recognized the fact that the landlord was a person who had some rights after all. The previous legislation had been entirely concerned with the tenant, and allowed the landlord to increase the rent in certain very limited circumstances. I should say that before that Act was passed one other thing happened. The increase was not to exceed the standard rent, and the standard rent, as defined in the earlier Acts, was the rent at which a house was let on the 3rd of August, 1914. A question had arisen before Bray J. whether that clause of that Act before 1920 meant the rent payable, or what you may describe as the net result to the landlord. That question arose in *Westminster and General Properties and*

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1921 "standard rent" meant the net rent, and that you had to take
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v. rates and taxes. Bray J. decided that rent meant the amount
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Scrutton L.J. and you were not to go into the net result of the rental or any
question as to rates and taxes. After that decision of Bray J.—
and I suppose we must assume that the draftsmen knew of it
—the Act of 1920 was passed, and it did recognize that in cer-
tain cases you were to deduct rates and taxes from the amount
of rental received. It included a definition of "net rent" which
was the standard rent less the amount of the rates where the
landlord paid them. So that Parliament, presumably having
its attention called to a decision that "rent" by itself meant
rent without taking into consideration rates and taxes, adopted
a new definition—"net rent" being the standard rent paid
in August, 1914, less the rates and taxes if paid by the landlord,
and applied that term "net rent" to two cases only. It
allowed the landlord to increase his rent by the extra cost of
repairs not exceeding 25 per cent. of the net rent, and to
increase the rent by a general increase, presumably due to the
scarcity of houses and the extra cost, not exceeding 15 per cent.
of the net rent; Parliament put in a similar provision with
regard to business premises, and then stopped using the term
"net rent"; and when the great increase of rates was of
course brought to the attention of Parliament they allowed
the landlord to increase his rent by an amount not exceeding
an increase of the amount for the time being payable by
the landlord in respect of rates over the amount which he
had paid on August 3, 1914. That remedy is still open
to the plaintiff in this case. She can increase her rent of
30*l.* a year by the difference between the rates which she
paid in 1914 for this house and the rates which she is paying
to-day. But she wants to do more, and whether she can do
more and terminate the tenancy, on the ground that the
premises are not subject to this Act, depends upon whether,
when Parliament in sub-s. 7 of s. 12 said, "Where the

rent payable . . . is less than two-thirds of the rateable value," they meant the rent which the tenant paid, or the net rent which the landlord received.

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Personally I can give no other meaning to the phrase "rent payable" than the sum which the tenant is called upon to pay by way of rent—namely, 30%. In the schedule to the Act, when the landlord gives his notice he says: "Take notice I intend to increase the rent of . . . at present payable by you as tenant," and I have no doubt that in this case the plaintiff would have completed the form by filling in 30% as the rent "at present payable by you as tenant." Whatever, if we were legislating, we might consider to be a desirable provision to enact, Parliament having used the words "the rent payable," I cannot think that they meant anything else but the sum which the tenant paid. It was the tenant that they were thinking of in this matter; it was the increase of rent on the tenant that they were intending to restrict, and the "rent payable" appears to me to point to the sum payable by the tenant.

For these reasons I agree with the judgment of Lush J., and the judgment which has been delivered by the Master of the Rolls.

YOUNGER L.J. I am of the same opinion. If I had found it possible as a matter of construction to place upon the word "rent" as used in this sub-section a meaning equivalent to the expression "net rent" as defined elsewhere in the Act, I should very gladly have done so; because we cannot, I think, look at this section and see the measure of relief which it purports to give, without seeing that, unless that interpretation can be properly placed upon the word "rent," the section will, first of all, not have the operation which presumably was intended, and, secondly, in every case in which the landlord pays the rates, it is, having regard to the height to which rates have risen in this country, not too much to say that there is probably no case to which the section will apply at all; because I apprehend that no district of England will be found, where the rates are

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paid by the landlord out of the rent, in which the "rent" will ever be two-thirds of the rateable value. And further, in support of the view, if it were at all possible, that "rent" should be interpreted as "net rent," is the fact that "rateable value," with two-thirds of which the rent is to be compared, is rateable value ascertained upon the footing that no part of the rates falls on the landlord, accordingly it would appear for the purpose of a proper comparison that the rent should equally be free from liability for rates or taxes on the part of the landlord. And that view is further confirmed by this, that if you refer to s. 2, sub-s. 3, of the Act you find there is a proviso inserted that the rent shall not be deemed to be increased where the liability for rates is transferred from the landlord to the tenant, if a corresponding reduction is made in the rent—which, as applied to this section that we are now considering, would have this effect: If before this question arose this landlady and tenant had met together and the landlady had said to the tenant "I will no longer ask you to pay me 30% of rent if you in place of that 30% of rent will pay the rates and taxes," the effect of that arrangement would have been presumably under the Act to reduce the rent to a point which would have brought it expressly within the terms of sub-s. 7 without affecting the real relation between the parties in the way of payment and receipt of money, except to the advantage of the landlady; yet nevertheless, if that arrangement had been made, presumably the landlady would have been entitled, under s. 12, sub-s. 7, to say that the tenancy as so adjusted was no longer within the Act; but, that arrangement not having been made, unless "rent" can mean "net rent" the Court is bound to say that the existing arrangement, which is in fact of less benefit to the landlady, is outside it.

Therefore there are very strong reasons, if as a matter of interpretation it were possible, for coming to the conclusion that "rent" in this particular sub-section means the equivalent of "net rent," as defined in the statute. But strong as are the reasons for that construction, and unforeseen, as I think

one must presume must the consequences be from the point of view of the Legislature, I hold that the words "rent payable," as used in this sub-section of the Act, must as a matter of interpretation have the meaning, and only have the meaning, of rent payable under the terms of letting by the landlord to the tenant—in this case 30 $\frac{1}{2}$. I am driven to that conclusion by the use of the word "rent" elsewhere in the Act, and I am also confirmed reluctantly in it by the interpretation placed upon the words "standard rent" by Bray J., where he has held—and, as the Lord Justice has pointed out, the framers of the Act must be deemed to have known of that decision—that the amount payable by way of rent meant that amount, irrespective altogether of whether the lessee does or does not have to pay the rates. Accordingly it appears to me that it is not possible, as a matter of interpretation, to place upon the word "rent" any other than its popular meaning, of rent payable under the terms of the letting. I feel bound to concur in the view expressed by my Lord and the Lord Justice that the judgment of Lush J. was right in this case, and that the appeal must be dismissed.

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Appeal dismissed.

Solicitors : *Winter & Plowman, for appellant ; Montgomery, White & Harcourt, for Thompson & Wright, Horsham.*

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[IN THE COURT OF APPEAL.]

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March 10, 15.

MORIARTY *v.* REGENT'S GARAGE AND
ENGINEERING COMPANY, LIMITED.

Company—Director—Remuneration—Provision in Articles as to—Contract for—Implied Term—Broken Period of Year—Claim for apportioned Sum—Apportionment Act, 1870 (33 & 34 Vict. c. 35), ss. 2, 5—Question as to applicability of Act not raised in County Court.

In November, 1919, the plaintiff agreed with an agent for an intended company to sell his business to that company, the payment to be partly in cash and the balance in debenture stock of the company. The agreement contained a clause providing "that the vendor shall be, and act as, one of the directors of the said company, and that his fees for so acting shall be 150*l.* per annum." The articles of the company when formed, the defendant company, provided that the remuneration of the directors should be "at the rate of" 150*l.* per annum, and such further sum (if any) as should be voted to them by the company in general meeting, and that such remuneration should be divided amongst the directors as they should determine, or failing agreement, equally. The company on incorporation adopted the agreement and the plaintiff received the debentures, which contained a condition entitling the company to pay them off at the expiration of six months. In December, 1919, the plaintiff was duly appointed a director to hold office so long as he held a certain amount of debentures in the company. Disputes having arisen between the plaintiff and the company, the plaintiff agreed to accept payment of all money due to him upon his debentures, and on May 14, 1920, the debentures were paid off, and thereupon he ceased to be a director. In an action by the plaintiff to recover a proportionate part of the 150*l.* as his fees for the period from December, 1919, to May, 1920, when he acted as director, the deputy county court judge gave judgment for the defendants, holding that the plaintiff was not entitled to remuneration for a broken part of a year. The Divisional Court reversed the decision of the deputy county court judge. On appeal:—

Held (1.) that the question of the applicability of the Apportionment Act, 1870, not having been raised in the county court, could not be raised on appeal.

(2.) That neither under the agreement nor under the articles was the plaintiff entitled to the sum he claimed.

(3.) That the Court would not in the circumstances of the case imply a term in the agreement that a proportionate part of the remuneration should be paid if the plaintiff's services terminated during a broken period of a year.

Decision of the Divisional Court [1921] 1 K. B. 423 reversed.

APPEAL by the defendants from a decision of the Divisional Court. (1)

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By an agreement dated November 19, 1919, made between the plaintiff and James Bogue Elliott, acting on behalf of a company about to be incorporated as the Regent's Garage and Engineering Co., Ltd., the plaintiff agreed to sell, and Elliott to purchase, the goodwill and stock in trade of the plaintiff's business as a motor-cab proprietor. Clause 3 provided that payment was to be partly in cash and 5000*l.* in first mortgage debenture stock of the company; and the company was to pay off 2000*l.* of the debentures within two years of December 1, 1919. Clause 4 was in these terms: "The vendor agrees to accept the balance of the purchase money, namely, 5000*l.*, in such debenture stock as aforesaid, and it has also been agreed that the vendor shall be, and act as, one of the directors of the said company, and that his fees for so acting shall be 150*l.* per annum."

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The company was duly incorporated with a share capital of 20,000*l.* divided into 6000 cumulative preference shares of 1*l.* each, 12,000 ordinary shares of 1*l.* each and 6000 deferred shares of 6*s.* 8*d.* each.

The memorandum of association provided (clause 3) that the objects for which the company was established were (inter alia) to enter into and carry into effect, with such (if any) modifications or alterations as might be agreed upon, the agreement of November 19, 1919.

The material articles were the following:

Art. 3 provided that the company should adopt the agreement referred to in the memorandum, and that the directors should carry the same into effect with full power nevertheless to agree, either before or after adoption, to any modification thereof.

Art. 76: "Until otherwise determined by a general meeting, the number of directors shall be not less than three nor more than ten. The first directors shall be James Bogue Elliott, John Tule Elliott, and Acton George Phillips, and each of them shall, subject to art. 81, be entitled to hold office so long as he lives and is the registered holder in his own right, and not jointly with any other person, of not less than 1000 ordinary shares in the company, and shall be called a

C. A. 'permanent director.' Every such director may act before
1921 acquiring his qualification, but shall acquire the same within
two months after the registration of the company.

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Art. 77: "The directors shall have power from time to time and at any time to appoint additional directors, provided that the total number of directors shall not exceed the prescribed maximum. Any director so appointed shall retire from office at the next general meeting but shall be eligible for re-election.

Art. 78: "The qualification of a director, not being a permanent director (hereinafter called an 'ordinary director'), shall be the holding in his own right alone, and not jointly with any other person, of 1000 ordinary shares or debentures of the company securing the aggregate principal sum of 2000*l.*, and this qualification shall be acquired within two months after appointment."

Art. 79: "Any permanent director who ceases to be such through ceasing to hold the prescribed number of ordinary shares shall, if qualified as an ordinary director, thereupon become and be an ordinary director."

Art. 80: "Subject to the provisions of these articles the remuneration of the directors shall be at the rate of 150*l.* per annum, and such further sum (if any) as shall be voted to them by the company in general meeting, and such remuneration shall be divided amongst the directors as they shall determine, or, failing agreement, equally. The directors shall also be entitled to be repaid all travelling and hotel expenses incurred by them respectively in or about the performance of their duties as directors, including their expenses of travelling to or from board meetings."

The company adopted the agreement of November 19, 1919, and the plaintiff received four debentures, one for 2000*l.* redeemable on December 1, 1921, and three for 1000*l.* each redeemable on December 1, 1924. All contained a condition entitling the company at any time to give notice to the holder to pay them off at the expiration of six months from the date of the notice.

At the first meeting of the company's board on December 19,

1919, the plaintiff was appointed a director to hold office so long as he held "1000 debentures" of the company.

Disputes arose between the plaintiff and the other directors. Ultimately the plaintiff agreed to accept from the company payment of all money due upon his debentures, and on May 14, 1920, the debentures were paid off, and the plaintiff ceased to be a director. He thereupon brought this action in the Clerkenwell County Court claiming 61*l.* 12*s.* in respect of his fees for the period during which he acted as director.

The deputy county court judge held that the action failed. He considered that he was bound by authority to decide that the plaintiff was not entitled to remuneration for the broken part of the year during which he had acted as director.

The plaintiff appealed. The Divisional Court held that as the plaintiff had an express contract with the defendants that he should receive 150*l.* per annum for his services as director, he was in receipt of a "salary" within the meaning of the Apportionment Act, 1870, and that his salary was apportionable. They further held, that, apart from the Apportionment Act, 1870, a term should, in the circumstances, be implied in the contract that a proportionate part of the remuneration should be paid if the plaintiff's services as director terminated during a broken period of a year.

The defendants appealed. The appeal was heard on March 10, 15, 1921.

Clayton K.C. and *Malcolm Hilbery* for the appellants. The respondent is not entitled to recover any proportionate part of his remuneration as a director. Clause 4 of the agreement is an indivisible agreement for the entire year: *Countess of Plymouth v. Throgmorton* (1); *Cutter v. Powell*. (2)

[YOUNGER L.J. Art. 80 provides that the remuneration of the directors shall be "at the rate of" 150*l.* per annum.]

The articles do not constitute a contract between the company and the directors. They may, of course, be looked at as to the terms on which a director is employed. The agreement

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(1) (1685) 1 Salk. 65.

(2) (1795) 6 T. R. 320; 2 Sm. L. C., 12th ed., p. 1.

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1921 inconsistent with the agreement.

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The authorities on the point are collected in Buckley on the Companies Acts, 9th ed., p. 621.

In *Salton v. New Beeston Cycle Co.* (1) the terms of the contract were governed by the articles alone.

[SCRUTTON L.J. In the case of death would not the salary be apportionable?]

It is submitted not, because that would be altering the contract.

The next case is *In re Central De Kaap Gold Mines* (2): see also *In re London and Northern Bank, Mack's Claim* (3); *In re London and Northern Bank, McConnell's Claim*. (4) Wright J. considered *Salton v. New Beeston Cycle Co.* (1), and held that the remuneration there was not apportionable. That case was also followed in *Inman v. Ackroyd & Best* (5), and there the Apportionment Act, 1870, was urged in argument.

Swabey v. Port Darwin Gold Mining Co. (6) is not a reliable authority.

[YOUNGER L.J. It has been cited for the statement by Lord Esher at p. 387—namely, that the articles show the terms upon which the director contracted with the company.]

Yes: see Buckley on the Companies Act, p. 621.

The remuneration of a director does not come within the Apportionment Act as a salary. It is not a salary. A director is a governor and does not receive a salary.

Here we rely on the agreement and the Act does not alter the contract: *Treacy v. Corcoran* (7); *Bishop of Rochester v. Le Fanu*. (8) In *In re United Club and Hotel Co.* (9) Kay J. states the true view of the object and effect of the Act.

It is said that the appellants are relying upon a statutory defence within Order x., r. 18, of the County Court Rules, 1903 and 1914. They are not doing so. The respondent

(1) [1899] 1 Ch. 775.

(2) [1899] W. N. 216, 235; 69
L. J. (Ch.) 18.

(3) [1900] W. N. 114.

(4) [1901] 1 Ch. 728.

(5) [1901] 1 K. B. 613.

(6) (1889) 1 Megone, 385.

(7) (1874) 1 R. 8 C. L. 40.

(8) [1906] 2 Ch. 513.

(9) (1889) 60 L. T. 665.

relies upon the statute and the appellants merely say that the statute is qualified: *Bright v. Rogers*. (1)

[LORD STERNDALE M.R. It is not a statutory defence, but rather the failure of the respondent to establish his case.]

[SCRUTTON L.J. referred to *Conroy v. Peacock*. (2)]

The Apportionment Act does not alter the relation between obligor and obligee: *Lowndes v. Earl Stamford*. (3)

[LORD STERNDALE M.R. That case does not help us. It is a decision upon another Act which does not contain the word "salary."]

J. B. Matthews K.C. and *Cartwright Sharp* for the respondent.

[LORD STERNDALE M.R. Are you basing your claim on the Apportionment Act or on the agreement?]

It is submitted that the respondent is entitled to the remuneration claimed under the agreement.

[YOUNGER L.J. Can you contend that remuneration to a trustee is "salary" within the meaning of the Apportionment Act?]

That depends on the nature of the remuneration. "Salary" means something higher than wages.

Inman v. Ackroyd & Best (4) has no application to the present case. There the fund could not come into existence until the end of the year, and therefore there was no money that could accrue from day to day. In *Salton v. New Beeston Cycle Co.* (5) there was no question of salary, but of the division of a lump sum among the directors at the end of the year, so that the Apportionment Act did not apply. In *In re Central De Kaap Gold Mines* (6), where the remuneration was so much "per annum," the Apportionment Act was not even referred to, and the same was the case in *McConnell's Claim*. (7) In *Palmer's Company Precedents*, 11th ed., Part I., p. 726, it is stated: "It is not easy to see why

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(1) [1917] 1 K. B. 917.

(2) [1897] 2 Q. B. 6.

(3) (1852) 18 Q. B. 425.

(4) [1901] 1 K. B. 613.

(5) [1899] 1 Ch. 775.

(6) [1899] W. N. 216, 235; 69
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(7) [1901] 1 Ch. 728.

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the Apportionment Act, 1870, does not apply. That Act expressly provides that all rents, annuities (including salaries and pensions), and other periodical payments in the nature of income shall be apportionable, and provides for the recovery in due course of an apportioned part of an annuity determined by death or otherwise. The Act was, however, clearly referred to and declared inapplicable, both in *Salton v. New Beeston Cycle Co.* (1) and *Inman v. Ackroyd & Best* (2), but it is evident that the point requires reconsideration. In *Salton v. New Beeston Cycle Co.* (1); *Lowndes v. Earl of Stamford* (3) (decided on the Apportionment Act, 1834) was relied on against apportionability, but the wording of that Act was very different to that of the Act of 1870."

The provision in s. 3 of the Apportionment Act is a statutory defence and was intended to preserve the defence of not guilty by statute. If therefore the appellants wished to rely on it as a defence they ought to have pleaded it.

It is submitted that the point as to the applicability of the Act was sufficiently taken in the county court to enable it to be now raised.

Further, it is submitted that on the construction of the agreement alone apart from the Apportionment Act the respondent is entitled to succeed on his claim, and that the Court will, if necessary, in the circumstances of the case, imply a term that a proportionate part of the remuneration should be paid to the respondent if his services as director terminated during a broken period of a year. The provision in clause 3 of the agreement as to payment off of the debentures shows that it was clearly in the contemplation of the parties that respondent's term of office might come to an end by the payment off of his debentures before the expiration of a complete year of service, and points to the necessity of implying a term that in that case he should be entitled to a proportionate part of his fees for the broken period of a year.

[YOUNGER L.J. My suggestion is that that provision was

(1) [1899] 1 Ch. 775.

(2) [1901] 1 K. B. 613.

(3) 18 Q. B. 425.

inserted in the agreement in order that the respondent should be in a position to protect his securities.]

Clayton K.C. was not called upon to reply.

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LORD STERNDALE M.R. I think this appeal should be allowed. It arises under somewhat unusual circumstances. Mr. Moriarty, the plaintiff, sold his business to the defendant company under an agreement, clause 4 of which was as follows : [His Lordship read the clause and continued :] That agreement was made by a person on behalf of or purporting to be a trustee for the company, before the company was formed, but whether it be really binding upon the company or not, I am not going to say. What happened was that the company did not adopt it in the usual way by making a new tripartite agreement, but they put their seal to it without having the seal properly attested, as it should have been. But I am not going to consider whether it was really binding or not, because the learned counsel for the company said that he was content to take it as binding upon the company.

By art. 76 of the company's articles certain persons were appointed first directors of the company, and by art. 77 power was given to them from time to time and at any time to appoint additional directors, the qualification of such director being by art. 78 the holding either of 1000 ordinary shares or of debentures securing the aggregate sum of 2000*l.* The articles then provided : [His Lordship read arts. 79 and 80, and continued :] The plaintiff was appointed a director by a resolution in the following terms : " It was resolved that William Moriarty be appointed a director of the company and shall hold such office so long as he holds 1000 debentures of the company." It was suggested, and I am willing to assume that 1000 debentures was a clerical error for debentures to the amount of 2000*l.*, because that amount of debentures was the qualification required. Disputes having arisen between the plaintiff and his fellow-directors, the directors paid off all his debentures and the plaintiff thereupon ceased to hold the necessary qualification and to be a director of the company. He then sued for his fees up to the time of his

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ceasing to be a director, a period of somewhat less than half a year. I have not been able to ascertain exactly even yet whether this claim is based upon the agreement alone or upon the articles alone, or upon the agreement and the articles, but I think that it is really upon the agreement, because if it be based upon the articles, the plaintiff is obviously not entitled to a proportionate part of the 150*l.*, as his remuneration under the articles would only be a proportionate part of the 150*l.*, which is to be divided amongst all the directors as they should agree, or in default of agreement, equally, and of course there could not be a default of agreement until the end of the year. Therefore in no case could he sue before the end of the year for any part of the remuneration that he was to receive under the articles. He has sued before the end of the year, and therefore if he is claiming under the articles, he is entirely out of Court. The leading counsel for the respondent, the plaintiff, said that he claimed under the agreement, and that he claimed under it to recover a proportionate part of the 150*l.* a year, first, upon the construction of the agreement, and secondly, upon some agreement that must be implied. The plaintiff brought his action in the county court, the particulars of his claim being: "The plaintiff's claim is for the sum of 61*l.* 18*s.* 10*d.*, being the amount of fees due to him as director of the defendant company. . . . To directors' fees for 150 days between " certain dates given " at the rate of 150*l.* per annum." The words " at the rate of " are in the articles, and therefore if he had been otherwise in a position to recover the fees under the articles, they would have been payable for broken periods, because they are to be payable " at the rate of " ; but for the reason I have already given, he obviously cannot sue under the articles.

This claim was attempted to be supported here, first upon the construction of the agreement, secondly upon the Apportionment Act, 1870, and thirdly, if both these grounds failed, upon an implied agreement to be inferred from the circumstances of the case. It seems to me that upon the construction of the agreement it must fail. It is a payment per annum, a payment for a year, and unless he serves for

the year he cannot get the payment. With regard to the Apportionment Act, I express no opinion whatever as to whether that Act would have applied to this agreement if it were open to the plaintiff to argue that it does, because I think it is abundantly clear that that point was never taken in the county court.

I have the notes of the learned county court judge before me, and it is quite obvious from them that the case was argued before him entirely upon the construction of the agreement or upon the implied agreement, to which I shall refer later. If the point as to the Apportionment Act had been raised in the county court, there was a conclusive answer to it, because under s. 3 of that Act the action cannot be brought until after the expiration of the period at which the lump sum or the whole sum would have been payable. The learned judges in the Divisional Court recognized that that would have been a defence, but they have excluded the defendants from taking it, because they say it is a statutory defence which was not pleaded. That, to my mind, emphasizes the importance of keeping to the rule that a point not taken in the county court cannot be taken on appeal. In the result the position is now that the defendants have been, according to the judgment of the Divisional Court, held liable on the construction of the Apportionment Act, and precluded from setting up their defence, because it was a statutory defence, and ought to have been pleaded, although they had never heard of the Apportionment Act, and it was not relied upon. It is quite clear that if the point on that Act had been taken in the county court it would have been open to the learned county court judge either to have allowed the defence to be pleaded then or to have adjourned the case, in order that it might be pleaded. There are quite sufficient precedents in the county court to have enabled him to do that. By not taking the point in the county court, the plaintiff has precluded the defendants from obtaining that indulgence, if it were an indulgence, from the county court judge.

We had occasion to say (and I think it was Atkin L.J. who said it more emphatically than any of us) in

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1921 not very long ago, that it is most important to remember that

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the right of appeal from a county court is a limited right, and that it is most important to preserve the rule that a point not taken in the county court shall not be taken on appeal. Therefore I pass by the question of the Apportionment Act. In my opinion it was not open in the Divisional Court; and it is rather curious that Lush J. in his judgment, according to the shorthand note, says: "It is said in answer to that, the plaintiff never took the point of the Apportionment Act"—so that this objection was taken in the Divisional Court. Then he goes on, "I do not agree. Although it was not mentioned in the particulars of claim, it was not necessary to mention it. The point was before the county court judge and was argued throughout on the basis that it was a claim for apportionment under the statute in addition to a claim I am going to deal with in a moment on the terms of the contract itself, and it is impossible to say that the Apportionment Act was not before the learned judge." I do not quite know what was in the learned judge's mind when he said that, because it has been stated in this Court quite frankly by both counsel who appeared in the county court that the point was not there taken, and the learned judge's notes show that it was not. That passage in the judgment of Lush J. is not in the report in the Law Reports, but it is in the shorthand notes, and it shows that the learned judge was under a misapprehension when he dealt with the case on the footing of the Apportionment Act. If he had apprehended the true facts as now admitted to us by both counsel—namely, that the point was not taken—he would never have gone into the question of that Act at all.

It must be inferred, it is said, from the circumstances that both parties meant that payment should be made for what I may call broken periods, and for that purpose *Swabey v. Port Darwin Gold Mining Co.* (2) is cited. It is a curious case. It is badly reported, and it is very difficult to ascertain exactly what was intended to be there decided, because the

(1) [1921] 1 K. B. 114.

(2) 1 Megone, 385.

report states that the articles contained the words "at the rate of," which in fact they did not, but the decision of the Court seems to have proceeded, as far as I can make out, upon the assumption that they did contain those words. In addition to that point, Lord Halsbury, who was then sitting in the Court of Appeal with Lord Esher and Lindley L.J., said that as he found in the articles a power to terminate by either side—namely, by resignation of the director or by dismissal of him by the company—there must necessarily be inferred from that an agreement to pay day by day—that is, to pay not for the whole period, but to pay for portions of the period, if the whole is not expired. That of course was an inference of fact which the learned judges drew in that case, but in a subsequent case before the Court of Appeal of *Inman v. Ackroyd & Best* (1), the same circumstances existed, there was the same right to resign and the same right to dismiss, and the Court was pressed with this decision of Lord Halsbury as a decision which bound the Court to infer that agreement whenever those elements were to be found. In that case the Court did not do so; they affirmed the judgment of the Court below, which had held that the plaintiff was not entitled to recover for a broken period, whereas if they had thought they were bound to draw the inference which Lord Halsbury drew in *Swabey v. Port Darwin Gold Mining Co.* (2) they must have allowed the plaintiff to recover.

The decisions of the Court of Appeal are of course binding upon us so far as they enunciate principles, but they are not binding upon us so far as they draw inferences of fact from facts which are not identical with those before us. There is nothing in *Swabey v. Port Darwin Gold Mining Co.* (2) in my opinion to oblige us to hold that wherever there is power, mutual or one-sided, to terminate an agreement in the middle of the year, there must, as a matter of necessity, be inferred a right to receive payment from day to day, and receive payment for the broken period. I do not think in this case there are circumstances which oblige me or induce me

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C. A. 1921 to draw that inference. Therefore I think that point, which is a point purely of fact, fails also.

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The result is that the appeal must be allowed, the judgment in favour of the plaintiff set aside, and the judgment of the county court judge in favour of the defendants restored with costs here and below.

SCRUTTON L.J. I do not profess that our decision is very satisfactory in view of the elaborate judgments which have been given in the Court below, as to the greater part of which we are not expressing any opinion, but that appears to me to follow from the very important fact that our functions as a Court of Appeal from the county court are of a strictly limited character. Since the decision of the House of Lords in *Smith v. Baker & Sons* (1) this Court has repeatedly said that it cannot allow points to be taken on appeals from county courts which were not taken before the county court judge.

The plaintiff in this case claimed directors' fees for 150 days between certain dates at the rate of 150*l.* per annum, and he produced in support of that claim an agreement adopted by the company, though somewhat irregular, that he should be and act as one of the directors of the company, and that his fees for so acting should be 150*l.* per annum. It is now said that that is a salary, and that being a salary it is apportionable under the Apportionment Act of 1870, and the two judges of the Divisional Court have delivered very elaborate and careful judgments upon that point dealing with a very large number of considerations.

Now it is quite clear that the point on the Apportionment Act was not taken at all before the county court judge. The plaintiff's counsel did not know that the Act applied; he had overlooked the fact that the interpretation clause (s. 5) of the Act included salaries, and therefore did not argue the point at all. The counsel for the defendants says that it was not argued, and the county court judge's note is entirely innocent of any reference to the Apportionment Act. Lush J. must have been under some momentary misapprehension

(1) [1891] A. C. 325.

in stating that it had been. The point therefore not having been argued in the county court, it is not open to the plaintiff to say, "I claim under the Apportionment Act," and there is very good reason why he should not be allowed to do so, because if he had claimed under the Apportionment Act, the Act itself would have shown that he had brought his claim too early, and that having regard to s. 3 of the Act he ought to have waited until the end of the year before he sued. On this point therefore, which is the point to which the greater part of the judgments of the learned judges below were devoted, what we say is that that point cannot be raised on this appeal. Consequently I do not propose to express any opinion on the numerous cases which have been cited to us. I only desire to say this, that it seems quite clear that as a matter of practice, the question of apportionment is now usually avoided or dealt with by using the words "at the rate of" in the articles. It seems clear from the decision of the Court of Appeal in *Inman v. Ackroyd & Best* (1) that when the articles are in the form that a certain sum shall be divided between the directors as they may agree, and, in default of agreement, equally, there can be no apportionment of that sum before the end of the year. That appears to me to be the effect of the decision in *Inman v. Ackroyd & Best*. (1) I should like to say this further, that having stated those two facts as fairly clear, it seems to me that there is no decision binding on the Court of Appeal as to whether directors' fees are salary within the Apportionment Act in the case where the agreement, if there is an agreement, is simply for payment of so much per year. I do not express any opinion one way or the other. It seems to me a very arguable point, and there does not seem to me at present anything to prevent that question being considered in the Court of Appeal when it arises.

The Apportionment Act being out of the way, the next question is, how, if at all, does the plaintiff claim? He had an agreement that he should be and act as one of the directors of the company, and that his fees for so acting should be

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1921 nothing more being said. I am not at all sure that the true
MORIARTY view of clause 4 of the agreement is not that the company
v. broke their agreement in not appointing him a director at
REGENT'S a remuneration of 150*l.* a year. If that is the case his claim
GARAGE is for damages for breach of agreement, which is a claim
Co. which was not made before the county court judge, and is
Scrutton L.J. not open to us to consider. His claim, if any, is either that,
or he must say : " There is an agreement ; you have appointed
me at 150*l.* per annum, and there is an implied term in that
agreement, that if you terminate my position by paying off
my debentures within the year, I shall have a proportionate
part of that 150*l.* per annum." I am not going to recite the
law of implied agreement, it has been done too often in this
Court. I was relieved that no counsel before us cited *The*
Moorcock (1), because we are getting a little tired of *The*
Moorcock (1), but as I understand the law, it does not imply
an agreement because it thinks it was reasonable for the
parties to make such an agreement, it only does so if it is a
necessary consequence from the facts proved ; so necessary
that if the parties had been asked, " What are you going to
do if so and so happens ? " they would both have replied,
" It was so obvious that we both of us never thought of
mentioning that." Now the curious circumstances of this
directorship, as was stated during the argument, arose
through an endeavour probably to enable the plaintiff to
protect his much more important interest, the large sum
of purchase money which was secured by the debentures. I
do not feel able to say as a matter of necessary implication
that there is any implied term that he shall have a part of
this very small remuneration as compared with the much
larger sum which is concerned with the debentures. I am
not at all sure that the parties would have agreed if it had
been mentioned to them, and I do not see my way to imply
it. The implication is a matter of fact in each case, and it is
not determined, in my view, by the decision which has been
referred to. Therefore, whether the plaintiff's claim be put

(1) (1889) 14 P. D. 64.

as damages for breach of the agreement, or on an implied term in the agreement, it seems to me that on the head of agreement the plaintiff fails, and the question of the Apportionment Act is not open to him. Therefore he fails, and the appeal should succeed on the terms stated by the Master of the Rolls.

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YOUNGER L.J. I am of the same opinion. I have before me the plaintiff's plaint in the county court. He claims by that document the sum of 61*l.* 12*s.* 10*d.* in respect of director's fees for the 150 days between December 15, 1919, and May 14, 1920, at the rate of 150*l.* per annum. Applying these words to the two instruments under one or other or both of which the plaintiff might claim, it is uncertain whether he is claiming under the agreement or whether he is claiming under the articles, or whether he is claiming under both. As a matter of fact his claim is wrong whatever be the instrument on which it is based. If it is to be justified under the agreement, then the remuneration there fixed is not remuneration at the rate of anything, but he would be entitled if these words were in that document, and there was no other objection to his demand, to the sum of 61*l.* 12*s.* 10*d.* If, on the other hand, he is claiming under the articles where the words "at the rate of" do occur, he might, if there were no other objection, be entitled to recover something, but it would not be the sum of 61*l.* 12*s.* 10*d.*: it would be, if anything, a very much smaller sum, for the annual remuneration of 150*l.* thereby fixed is the remuneration of all of the directors, not of one of them only. Accordingly it is not on the face of this plaint in the county court, capable of being ascertained under which of the instruments in question the plaintiff is claiming, nor does it appear how it can be justified by a blend of both. It was stated here by counsel on each side that in point of fact the claim was intended to be made and justified under the agreement. If so, then either it is not open to the plaintiff at all, because the plaintiff has not served a full year, or if, notwithstanding that difficulty, it be open to him by virtue of the Apportionment

C. A. Act, then the Apportionment Act is neither by inference nor
1921 by necessary implication referred to in the plaint. Nor
MORIARTY was that Act, either by inference or necessary implication,
v. vouched in the county court subsequently, nor was it referred
REGENT'S to by counsel before the county court judge ; in fact it was
GARAGE never thought of there by any of the parties concerned.
Co. Accordingly on an appeal to the Divisional Court, the appellant
Younger L.J. still relying on the agreement, it seems to me that no reference
to the Apportionment Act, either by one side or the other,
was permissible so as to entitle the plaintiff to maintain
a claim which, apart from the Apportionment Act, he would
not be entitled to succeed upon. In the same way that Act
is not open to either of the parties before us, for it must never
be forgotten that it is only a limited right of appeal that
an unsuccessful suitor in the county court is possessed of, and
if that limited right did not entitle the plaintiff in the Divisional
Court to refer to the statute which enabled him there to
succeed, it follows that this appeal against the judgment of
the Divisional Court must be sustained if the respondent's case
is really based on the agreement and only on the agreement.
But I ought further to add that if the effect of the Apportion-
ment Act were open to us to consider on this appeal, I desire
to leave entirely open the question whether on the wording
of this agreement it would assist the respondent. That
question, as a result of the views expressed upon it by the
learned judges in the Divisional Court, may make it necessary
to discuss on some future occasion whether all that series of
cases, and many others to the same effect not reported,
which have decided that where remuneration is payable to
a director by a lump sum per annum, and not at the
rate of a lump sum per annum, the Apportionment Act
has no application to the case, are misconceived. That
question does not arise now, and speaking for myself I am
not prepared to express any opinion at present in favour
of the view arrived at by the Divisional Court with reference
to it when I survey all those previous authorities, some of
them in the Court of Appeal.

In the argument, however, before us the case of the

respondent was placed, not only upon the agreement, as it stands, but also upon what was called an implied term therein, deducible from the fact that the respondent was the vendor to the company who had received debentures in part payment of his purchase price and who was entitled by stipulation made by himself to a directorship carrying with it a certain remuneration. Accordingly it was said you ought to imply in the written agreement a term to the effect that if, for any reason, the respondent's directorship ceased to exist during any broken period of a year the respondent was to be entitled to remuneration in respect of that period, because it could not be supposed that these parties agreeing as they did at the time when they did, would have omitted such a provision had the matter been called to their attention. I hope I have stated the contention fairly, but if I may be allowed respectfully to say so, I entirely agree with what Scrutton L.J. has just said as to the implication of such a term in an agreement like this. If I were asked myself to say whether, either judicially or otherwise, I thought that any such agreement ought to be implied into this agreement my answer would be No, and for a reason already indicated by the Lord Justice. The implication I should draw from this agreement is that the respondent's directorship was no more than a further security for himself as a debenture holder during the time that he held the debentures or some of them to be issued to him under the agreement. If, contrary probably to his most sanguine expectation, it did happen that these debentures were paid off by the company before they became due, I should surmise that his feeling would then be one not of regret that he had lost the directorship, but of satisfaction that he had been paid his purchase money in cash before it was really due. Accordingly, if one were at liberty to speculate (and much more than speculation is required to justify the implication of further terms in a written agreement like this), but if one were at liberty to speculate, whether the parties did intend this implied term to be included in the bargain between them, my speculation would be that they did not, and that accordingly, if the

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respondent's case on the agreement depends on the implication of such a term, it necessarily fails. But then it is further said that there are further terms capable of being implied. The further implications are, it is said, of this kind. To arrive at them you are entitled, so it is contended, to go to the articles, and if you do you will find, it is said, various provisions with regard to directorships, amongst others, a provision as to remuneration in a sum payable at the rate of so much ; and accordingly it is said by reference to the articles you are able to arrive at a conclusion in favour of the respondent, which depends neither on the Apportionment Act nor on the implication of the term alluded to.

This brings me, I hope in a very few words, to deal with an aspect of the case which I should not, but for this argument, have thought it necessary to discuss—namely, what is the legal position of these parties both under the agreement and under the articles in the events which have happened.

Now, if you look at the agreement, which was an agreement made before the incorporation of the company, you will find, first of all, that there is a recital to the effect that the vendor, that is the present respondent, Captain John Yule Elliott, the purchaser, and Acton George Phillips, are to be the first directors of the company. Then you will find in clause 4 this : [His Lordship read the clause, and continued :] Now to my mind it is plain from the above recital and that clause that it was not intended that the rights and duties of the vendor, as director, should be found within the four corners of the agreement. It was plainly contemplated that he was going to be appointed with the two named persons one of the first directors by the articles of the intended company with his duties and responsibilities and rights and privileges as such there prescribed. If the agreement is alone to be looked at, the respondent would be entitled to be appointed a director indefinitely, and he would be entitled to be appointed a director at 150*l.* a year, again indefinitely, whether with or without qualification, there being no provision there as to his ceasing to hold office, from any want of qualification. That would appear to be his position under the agreement,

and, as the Lord Justice has pointed out, that is its true meaning. The articles of association, which have become the articles of this company, do not give effect to it: in many respects they fail to provide for the rights of the respondent, if these be his rights. And subject to the point I have already made that the respondent's directorship under the agreement was not contemplated as being held by him after his debentures had been paid off, I think they were his rights under the agreement, and I think that when the company adopted that agreement without any further agreement from him he was entitled to say to them: "You shall by your articles appoint me to be a director and give me the rights which under and by virtue of this agreement any proper Court of construction would say I am entitled to." That, I think, was his position. But what happened? The company was incorporated with a set of articles which begin by making it the first purpose of the company to adopt this agreement and carry it out with such modification, if any, as may be thought fit, and go on to direct the directors to enter into an agreement for that purpose. Then they provide for the qualification, election and remuneration of directors. They do not appoint the respondent as a first director. The only power there is under the articles to appoint him a director at all is under art. 77, under which the first directors have power to appoint additional directors. Nor have the directors power to appoint him a director without qualification. Nor did their resolution of appointment purport to do so. That resolution provides that the respondent's qualification shall be 1000 debentures. I think myself that that is a mistake, but I do not think it is a mistake of inadvertence or a wrong figure. I think that the person responsible for this insertion of this qualification misread art. 78, and when he made the qualification 1000 debentures he had failed to observe that the proper qualification was debentures of 2000*l.* in value, and that the figure 1000 in the article had no reference to debentures at all. But still there is that qualification required of the respondent. Then you come to art. 80, and you find the remuneration is fixed for all, not for the respondent or

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for one, of the directors at the rate of 150*l.* per annum, and that that remuneration in default of agreement is to be divided equally amongst the directors. Now in all these respects it may be said by the respondent that these articles and his appointment under them have not been a compliance by the company with his rights under the agreement. Let it be so, but what then? The respondent has accepted office under these articles. He has been appointed under and by virtue of them. He has served as a director under that appointment without complaint of any sort or kind by himself or any one else. It appears to me therefore that the result is, as between the respondent and the company, that he has accepted, and cannot be heard to say that he has not accepted, the rights conferred upon him or reserved for him as a director by these articles. He has no other rights in the matter. Accordingly, in my view, having regard to what has happened, any right which the respondent has in respect of remuneration is a right to such remuneration as he was entitled to under this art. 80 and no more. Now the curious part of this case is that it did not suit either party to put forward that view. It did not suit the respondent, because it cuts him down to a very small sum, and to no sum at all until the end of the year after the directors have agreed or have failed to agree as to the principle of division. It did not suit the company, because it introduces into the basis of remuneration the words "at the rate of." So both parties, by a curious perversity, have adhered to a view of the rights of the matter which does not appear to me to be in accordance with the fact. What then is the respondent's position, relegating him, as I think he ought to be relegated, entirely to his position under the articles? I think he is entitled to be remunerated at the rate of 150*l.* a year, sharing that sum with the three other directors, but I think also that under the article, just as under the agreement, he was entitled to nothing till the end of the year of his disqualification for the reason I have given. So that although in my view the respondent might in a properly constituted proceeding at a proper time have been in a position to recover under the

articles quite a trivial sum for his services for the broken year, he was not entitled to recover even that trivial sum when he brought his claim in the county court. Nor did he attempt to claim that sum. His claim was under the agreement and, to my mind, any claim of his under the agreement had long since disappeared. In my view accordingly this appeal ought to be allowed.

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Appeal allowed.

Solicitors for appellants : *Lidiard & Perowne.*

Solicitors for respondent : *Edmund O'Connor & Co.*

W. I. C.

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April 14.

Local Government—Mental Defective—Residence—Certified Institution—Maintenance by local Authority—Liability—Constructive or actual Residence—Mental Deficiency Act, 1913 (3 & 4 Geo. 5, c. 28), ss. 43, 44, 69.

By the Mental Deficiency Act, 1913, a judicial authority under the Act has power to make an order declaring a person to be a mental defective and ordering him to be sent to an institution. Such institutions may be certified by the Board of Control appointed under the Act.

By s. 43, sub-s. 1, where a person is ordered to be sent to a "certified institution," the local authority responsible for providing accommodation for that person is the council of the county or county borough in which he resided (to be specified in the order).

By s. 44, sub-s. 3, where a council are aggrieved by a decision as to the place of residence of any person, they may appeal to petty sessions for an order transferring liability to another council; and (sub-s. 4) "in the case of doubt as to where a person resides the expression 'place of residence' in this section shall be construed as the county or county borough (as the case may be) in which the person would, if he were a pauper, be deemed to have acquired a settlement within the meaning of the law relating to the relief of the poor."

By s. 69: "The time during which a defective is detained in an institution or resides in an approved home under this Act shall for all purposes be excluded in the computation of time mentioned in section one of the Poor Removal Act, 1846, as amended by any subsequent enactment":—

Held, that the words "reside" and "place of residence" in the above sections mean physical residence, that is, the place where the person

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in question eats, drinks, and sleeps; and that unless and until a doubt arises as to such residence, no question of Poor Law settlement has to be considered. The word "resides" in s. 69 is used in the same sense as in s. 44, and a person living in a certified institution "resides" there within the meaning of those sections.

Per Salter J. In determining the residence of mentally defective persons for the purposes of the Act, either volition is not essential to "residing," or mentally defective persons are capable of such volition as is essential.

CASE stated by justices for the county of Berkshire.

At a court of summary jurisdiction sitting at Abingdon, in the county of Berkshire, on November 5, 1920, an order was made under the Mental Deficiency Act, 1913 (1), transferring the liability in respect of Daisy Haddon, a "defective"

(1) The Mental Deficiency Act, 1913 (3 & 4 Geo. 5, c. 28), provides as follows:—

Sect. 30: "The local authority are hereby empowered, and it shall be their duty, subject to the provisions of this Act and to regulations made by the Secretary of State—

"(a) to ascertain what persons within their area are defectives subject to be dealt with under this Act otherwise than under paragraph (a) of sub-section one of section two of this Act";

Sect. 43, sub-s. 1: "Where a person is ordered to be sent to a certified institution or to be placed under guardianship, the local authority responsible for providing accommodation for that person or making provision for his guardianship, as the case may be, shall be the council of the county or county borough in which he resided (to be specified in the order), and the duties of that council shall include, in the case of a person ordered to be sent to a certified institution, the duty to provide for his conveyance to, and reception and maintenance in, such an institution."

Sect. 44, sub-s. 1: "Where the order is made in respect of a person

found guilty of an offence, that person shall for the purposes of the provisions of the last preceding section be presumed to have resided in the place where the offence was or was alleged to have been committed, unless it is proved that he resided in some other place:

"Provided that, where the order is made by a court of assize or quarter sessions, the court shall remit to a court of summary jurisdiction for the place where the person is committed for trial the determination of his place of residence."

Sub-s. 2: "Where the order is made by the Secretary of State, then:—

"(a) if the order is in respect of a person in a prison, inebriate reformatory, criminal lunatic asylum, or place of detention, that person shall, for the purposes of the provisions of the last foregoing section, be presumed to have resided in the place where the offence was or was alleged to have been committed, unless it is proved that he resided in some other place;

"(b) If the order is in respect of a person in a reformatory or industrial school, that person

within the meaning of that Act, from the respondents, the Borough Council of Reading, to the appellants, the County Council of Berkshire. This order reversed an order of the judicial authority under the Mental Deficiency Act, 1913, determining that the respondents were the local authority responsible to provide accommodation for her, and ordering them to pay to the appellants any expenses incurred in respect of her.

Daisy Haddon was born on April 18, 1889, at Reading within the respondent's area; she was the illegitimate daughter of Margaret Haddon, a single woman, who was then in service at Marylebone within the area of the London County Council, but went to Reading to be confined, afterwards returning to Marylebone. From the date of her birth until November, 1907, Daisy Haddon resided in Reading

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shall, for the purposes of the provisions of the last foregoing section, be deemed to have resided in the place (if any) determined to have been his place of residence for the purposes of his committal to the reformatory or industrial school."

Sub-s. 3: "Where a council are aggrieved by a decision as to the place of residence of any person, they may, within three months after the making of the order, apply to a petty sessional court acting in and for such place as may be prescribed, and that court, on proof to its satisfaction that the person in respect of whom the order was made was resident in the area of some other council, and after giving such other council an opportunity of being heard, may transfer the liability to that other council, and may order that other council to repay the first-mentioned council any expenses incurred by them in respect of the

person in question, and an appeal shall lie from the decision of the court to a court of quarter sessions; but nothing in this provision shall affect the liability of the first-mentioned council under the original order until an order made transferring the liability to another council comes into force."

Sub-s. 4: "In the case of doubt as to where a person resides the expression 'place of residence' in this section shall be construed as the county or county borough (as the case may be) in which the person would, if he were a pauper, be deemed to have acquired a settlement within the meaning of the law relating to the relief of the poor."

Sub-s. 5:

Sect. 69: "The time during which a defective is detained in an institution or resides in an approved home under this Act shall for all purposes be excluded in the computation of time mentioned in section one of the Poor Removal Act, 1846, as amended by any subsequent enactment"

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and for some time her mother paid five shillings per week for her maintenance there as a paying guest. In 1907, on the application of her mother she was placed at the Cumnor Rise Home, Berkshire, which belonged to the Oxford branch of the National Association for Welfare of the Feeble-minded. Her mother paid the association six shillings per week towards her maintenance there until September, 1914, after which date the payments became irregular, and in 1917 ceased altogether.

The Cumnor Rise Home was founded by means of voluntary donations, and the working expenses of the home were provided from the voluntary subscriptions and donations of members and their friends as well as of the relatives of inmates. The objects of the home were to provide a permanent home for feeble-minded girls, and no girl was accepted for admission unless her parents or friends promised to contribute towards the expenses of her maintenance.

After the passing of the Mental Deficiency Act, 1913, in May, 1913, the Cumnor Rise Home became a "certified Institution" within the Act under the supervision of the Board of Control, and was then known as the "Cumnor Rise Institution for the Mentally Defective." The staff consisted of a lady superintendent and matrons, who looked after the industries, the laundry, the house, and the kitchen. None of the staff had any nursing qualifications, and no hospital treatment was provided. In case of emergency a doctor was called in, and, since the certification of the home in 1914, his visits were chiefly for the purpose of examining cases on admission, or certifying cases for continued detention. The inmates of the home were trained in kitchen, laundry, and needlework, in the hope of an improvement in their condition, but such improvement had only taken place in one or two instances. Haddon could have voluntarily left the home at any time until June, 1920, when she was dealt with as a defective within the Mental Deficiency Act, 1913; but she would not in practice have been allowed to leave, except with the approval of the committee or of her parent.

A petition dated June 18, 1920, was presented by an

inspector of the Board of Control appointed under the Mental Deficiency Act, 1913, before a judicial authority under that Act, and on June 30, 1920, the judicial authority ordered Haddon to be detained in the home as a mentally defective person, and determined that the respondents were the local authority responsible for providing accommodation for her as being the council of the county borough where she resided, and ordered the respondents to pay to the appellants any expenses incurred in respect of her.

On behalf of the appellants it was contended before the magistrates :—

1. That the terms “resided,” “place of residence,” and “was resident” in ss. 43 and 44 had the same meaning.

2. That something more than sleeping in a district was necessary to cast the liability of providing and paying for the maintenance of the defective on the appellants.

3. That the scheme of the Act showed that residence must be of such a kind as either did or would ultimately lead to a status of irremovability or settlement within the Poor Law Statutes.

4. That the Act differentiated between defectives physically within the area and those residing within the area.

5. That Haddon had not “resided” in the county of Berks.

6. That she was incapable of acquiring a Poor Law settlement there.

7. That she had not in fact obtained a settlement or status of irremovability there.

8. That the conditions under which she was an inmate of Cumnor Rise Home were such as to preclude her from obtaining a settlement or status of irremovability.

9. That the Cumnor Rise Home came within the meaning of “Hospital” prior to the Mental Deficiency Act, 1913, and that s. 69 of the Act specially excepted such institutions since the Act in connection with Poor Law irremovability.

10. That the presumption of place of birth as the place of settlement applied.

The attention of the justices was directed to the following

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1921 cases : *Fulham Union v. Isle of Thanet Union* (1) ; *Fulham Parish v. Woolwich Union* (2) ; *Kent County Council v. London County Council* (3) ; *Stoke-on-Trent Borough Council v. Cheshire County Council* (4) ; *Ormskirk Union v. Chorlton Union* (5) ; *Ormskirk Union v. Lancaster Union* (6) ; *Yorkshire W. Riding County Council v. Colne Corporation*. (7)

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On behalf of the respondents it was contended that upon the facts proved, Haddon resided within the county of Berks for the purposes of the Mental Deficiency Act, 1913, and that, while she had in fact acquired a status of irremovability and also a settlement by her residence at Cumnor Rise, there was "no case of doubt" within the meaning of s. 44, sub-s. 4, of that Act, and that that sub-section had no application to the case.

The justices being of opinion that there was no case of doubt, and that Haddon resided in the county of Berks, made an order transferring the liability to the appellants.

The question for the opinion of the Court was whether the justices on these facts came to a correct determination in point of law, and if not what should be done under the circumstances.

Earengay for the appellants. The defective never "resided" at the institution within the meaning of the Act. She was detained there as a defective and was incapable of volition. By s. 69 of the Act of 1913 the time so spent is to be excluded in computing time under the Poor Removal Act, 1846. The duties of local authorities towards persons "within" their area under s. 30 (a) of the Act are distinct from their duty towards persons "residing" in their area. They are only liable for supervision of the former, but for the maintenance of the latter. The defective here was only within their area.

Secondly, this Act was passed to amend the Lunacy Acts

(1) (1881) 7 Q. B. D. 539.

(2) [1907] A. C. 255.

(3) (1915) 84 L. J. (K. B.) 1781.

(4) [1915] 3 K. B. 699.

(5) [1903] 1 K. B. 19; [1903] 2 K. B. 498.

(6) [1912] W. N. 264.

(7) (1917) 82 J. P. 14.

and the place of settlement under the Poor Law is therefore material. In *Reg. v. Whitby Union* (1) volition was held essential in order to acquire a new residence. Here the defective had no choice, her place of settlement was her place of residence, that is, her birth-place. There is at all events an element of doubt sufficient to justify the finding of the judicial authority, and to bring the case within s. 44, sub-s. 4.

Thirdly, this institution was a "hospital" and the girl's residence was not affected by her stay there. The term "hospital" is not confined to an institution where there is a resident staff of doctors and nurses.

Herbert Davey for the respondents. "Physical" residence is intended by the word "resided" in ss. 43 and 44 of the Mental Deficiency Act, 1913. "Constructive" residence cannot be considered: *Stoke-on-Trent Borough Council v. Cheshire County Council*. (2) That case was decided under s. 74, sub-s. 7, of the Children Act, 1908, which is practically identical with s. 44, sub-s. 3, of the present Act. This decision was followed in *Leicester Corporation v. Stoke-on-Trent Corporation* (3), where a boy who had been sent to Leicester in charge of a probation officer was held to "reside" there. So "volition" is not really essential, although there is no evidence that residence in the home was not voluntary on Haddon's part. A person need not be in possession of full mental faculties in order to acquire a Poor Law settlement: *Ormskirk Union v. Lancaster Union*. (4)

The matter is to be decided upon the words of the Act, and not by reference to Poor Law principles, which are not to be considered unless and until a doubt arises: s. 44, sub-s. 4. Here, as in *Kent County Council v. London County Council* (5), there is no element of doubt. [He referred also to *Fulham Parish v. Woolwich Union* (6) and *Fulham Union v. Isle of Thanet Union*. (7)]

(1) (1870) L. R. 5 Q. B. 325.

(2) [1915] 3 K. B. 699.

(3) [1919] Current Digest 207; L. J. (K. B.) 1781.
88 L. J. (K. B.) 836.

(4) [1912] W. N. 264.

(5) [1915] Current Digest 338; 84

(6) [1907] A. C. 255.

(7) 7 Q. B. D. 539.

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Earengay in reply. *Kent County Council v. London County*

Council (1) is distinguishable. There the defective was residing in London for two years of her own free will; there was no element of doubt in the matter. Here the committee would not have let her go without her parents' consent.

DARLING J. I think this is a case of very great difficulty, and knowing what is the view of Avory J. and of Salter J., I shall say no more than that I do not differ from the judgment which they will pronounce. This is a case in which, with leave, an appeal will lie, and I think that the appellant here, against whom the decision will be, should have leave to appeal if he asks for it.

AVORY J. This is a case stated by justices, arising from an appeal which was made to the petty sessions, under s. 44, sub-s. 3, of the Mental Deficiency Act of 1913. On that appeal, the County Council of the county of Berks alleged that they were aggrieved by a decision as to the place of residence of a person who had been certified to be a mental defective, within the meaning of this Act. That order certifying the person to be a mental defective had been made by the judicial authority under ss. 4 and 5 of the Mental Deficiency Act of 1913, and s. 43, sub-s. 1, provides that when such an order is made, ordering a person to be sent to a certified institution, the local authority responsible for providing accommodation for that person shall be the council of the county or county borough in which he or she resided, to be specified in the order. I can entertain no doubt that those words mean that the order must specify the place where the defective resided at the time when the order was made. In this case, the judicial authority decided that the respondents here—namely, the council of the county borough of Reading, were responsible, that being the place where the judicial authority said that she resided; and an order was made upon the council of the county borough of Reading to pay the necessary expenses. Thereupon this appeal

(1) [1915] Current Digest, 338; 84 L. J. (K. B.) 1781.

was made, as I have said, under s. 44, sub-s. 3, to the Petty Sessions, and the Court determined that there was no case of doubt within the meaning of sub-s. 4 of that section, and that Daisy Haddon (the mental defective) resided in the county of Berks, and they accordingly made an order transferring the liability to the appellants, who are the County Council of the county of Berks. The question for the opinion of the Court is, whether the justices were right in coming to the conclusion that this was not a case of doubt as to where a person resides within the meaning of sub-s. 4. In my opinion, they were right in coming to that conclusion. Sect. 44, sub-s. 1, provides for the case of a person found guilty of an offence, which does not apply here. Sub-s. 2 applies to the case where an order is made by a Secretary of State; that does not apply here. Sub-s. 3 provides for an appeal by a council who are aggrieved by a decision as to the place of residence of any person, and at first sight that might appear to be limited to the cases already provided for in sub-ss. 1 and 2; but this Court has decided quite recently (1) that sub-s. 3 applies generally to any case of an order which is made under s. 43, sub-s. 1, and, having so decided, I am of opinion that sub-s. 4 also applies in any case where such an order has been made under s. 43, sub-s. 1. Sub-s. 4 is in these terms: "In the case of doubt as to where a person resides the expression 'place of residence' in this section shall be construed as the County or County Borough (as the case may be) in which the person would, if he were a pauper, be deemed to have acquired a settlement within the meaning of the law relating to the relief of the poor." It appears to me that until and unless a doubt arises as to where a person resides, no question of Poor Law settlement has to be considered at all. It is only to be considered where there is a doubt as to where the person in question resides in the ordinary sense of the term, without any technical meaning attached to the word such as is to be found in decisions relating to Poor Law settlements; and in my opinion that

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(1) *Reg. v. Wyatt and Others*. Decided by a Divisional Court on *Ex parte London Council*. Unreported. February 28, 1921.

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word must be construed in the same way in which it has been already construed by this Court under the Children Act of 1908, s. 74, sub-ss. 1 to 7. Two cases have been argued before this Court, arising under those sections, which provide that where a youthful offender is ordered to be sent to a certified reformatory school it shall be the duty of the council of the county or county borough in which he resides, to be specified in the order, to provide for his reception and maintenance ; these words are almost identical with the words of s. 43, sub-s. 1, of the Mental Deficiency Act of 1913. Then sub-s. 3 of the Children Act provides that for the purposes of the foregoing provisions of this section, a youthful offender shall be presumed to reside in the place where the offence was committed, unless it was proved that he resided in some other place. Those words again are identical with the words of s. 44, sub-s. 1, of the Mental Deficiency Act of 1913. Sub-s. 7 of the Children Act provides that where a local authority are aggrieved by the decision of a Court as to the place of residence, they may apply to a Petty Sessional Court ; and that Court on proof to its satisfaction that the offender was resident in the area of another local authority, may transfer the liability. Those words again are almost identical, in effect they are identical, with the provisions of sub-s. 3 of s. 44 of the Mental Deficiency Act. I can see no reason for giving any different interpretation or meaning to the word “resides” in the Mental Deficiency Act to that same word in the Children Act of 1908. In *Stoke-on-Trent Borough Council v. Cheshire County Council* (1), it was held by Lord Reading C.J. that the word “resides” in that statute means the place where the youthful offender has his bed, and where he dwells. Ridley J. says : “The place of residence of a person is the place where he eats, drinks and sleeps” and that definition is to be found in the case of *Rex v. Inhabitants of North Curry* (2), an ancient authority which has been recognized for many years, where Bayley J. said : “What is the meaning of the word ‘resides’ ? I take it that that word, where there is nothing to show it is used

(1) [1915] 3 K. B. 699, 706.

(2) (1825) 4 B. & C. 953, 959.

in a more extensive sense, denotes the place where an individual eats, drinks and sleeps, or where his family or his servants eat, drink and sleep." Ridley J. goes on: "That is the generally accepted meaning of the word." That decision was followed in *Leicester Corporation v. Stoke-on-Trent Corporation* (1), where the Court was constituted as it is to-day. In that case it was held that the youthful offender under the Children Act of 1908 had been properly found by the justices to be resident in Leicester, the place to which he had been sent by order of a Court of Justice, and where he was, in fact, living—that is to say, eating, drinking and sleeping, under the supervision of a probation officer. I adopt the view which was expressed in those cases as to the meaning of the word "resides," and I think it ought to be applied to this statute, and if it is so applied then there can be no doubt that this woman, in fact, resided physically in this institution, which is in the county of Berkshire. A considerable argument has been addressed to us to the effect that she did not reside in this institution at all, because it was not of her own volition that she remained there. That question might be very important if we had to consider whether she had acquired a settlement for Poor Law purposes by her residence in this institution. But, as I have already said, no question arises as to her Poor Law settlement, or whether this residence would have conferred a settlement upon her, under this statute, except in cases where there is a doubt as to the place where she resides. In my opinion it cannot be contended that the kind of doubt which is contemplated there is a doubt which might arise when you are considering a Poor Law settlement. It is only when a case of doubt arises in considering the physical residence of a person, not the technical residence which will constitute the Poor Law settlement, that you are to have recourse to the law relating to the settlement of the poor. I think that view is to some extent, at all events, borne out by the provisions of s. 69 of the same statute, which says that the time during which a defective is detained in an institution or resides in an approved home under this Act

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(1) [1919] Current Digest 207; 88 L. J. (K. B.) 836.

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shall, for all purposes, be excluded in the computation of time mentioned in s. 1 of the Poor Removal Act, 1846, which is the section relating to irremovability. I cannot doubt that the word "resides" is used in the same sense in s. 69 as it is used in s. 44, and if it is used in the same sense, then it contemplates that a person who is living in such an institution as this does reside there. I come to the conclusion, therefore, that this defective woman was residing, within the meaning of this statute, at the institution within the county of Berkshire, and that therefore the decision of the justices was right and that this appeal ought to be dismissed.

SALTER J. I am of the same opinion. On June 30, 1920, which is the material date, Daisy Haddon was a woman about thirty-one years of age, and she had, in fact, lived in Cumnor Rise Home since she was about eighteen, a period of some thirteen years. During the whole of that time she had had a legal right to leave this institution at any time, and there was no evidence that she had ever attempted to do so, or expressed any wish to do so. Upon those facts I think that Daisy Haddon resided in this home at the material date, and that it was not a case of any doubt as to where she resided; and if so Petty Sessions were right. I think that Mr. Earengy's argument amounted to this: he admitted that this woman resided at this home in the ordinary sense of the word, that she slept and ate and lived there, and had done so for many years; and that it was, in fact, her home and her only home; but he contended that that was not residence within the meaning of the Mental Deficiency Act, 1913, on two grounds. He said that "volition" is necessary for residence under the Act, and he said first that this woman was incapable of volition and next that in any case she had, in fact, been imprisoned and detained in this place. As to the second point, I see no evidence at all that her residence in the home during those thirteen years had not been entirely voluntary. As to the point that volition is necessary to residence under the Act, and that a mentally defective person is incapable of volition, it may well be that questions of

difficulty and importance might arise whether, and how far, volition is necessary for residence; but it is, to my mind, clear that defectives are capable of residing within the meaning of this Act, and it therefore follows either that volition is not essential to residing under this Act, or that persons mentally defective are capable of such volition as is essential to such residing.

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Appeal dismissed.

Solicitors for appellants: *Rawle, Johnstone & Co., for J. T. Morland, Clerk to Berkshire County Council.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for C. S. Johnson, Town Clerk, Reading.*

F. P. F.

PHILLIPS v. BARNETT.

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May 2.

Emergency Legislation—Dwelling Houses—Conversion of Several into one Building—Standard Rent—Increase of Rent, &c. (Restrictions), Act, 1920 (10 & 11 Geo. 5, c. 17), s. 1; s. 12, sub-s. 1 (a), sub-s. 6, and sub-s. 9.

Sect. 2, sub-s. 5, of the Increase of Rent, &c., Act, 1915 (re-enacted in s. 12, sub-s. 6, of the Increase of Rent, &c., Act, 1920), which provided that "Where this Act has become applicable to any dwelling-house . . . it shall continue to apply thereto whether or not the dwelling-house continues to be a dwelling-house to which this Act applies," did not mean that the Act should continue to apply even though the house had been subjected to such structural alterations that it had ceased to be the same house.

In 1918 the owner of three adjoining houses to which the Increase of Rent, &c., Act, 1915, applied joined them together and converted them into a factory. For that purpose the houses were gutted, the staircases being removed and a new staircase built in a new position; but the main walls and roof were left untouched and the party walls were only altered to the extent of having doorways cut through them on each floor to allow of internal communication between the houses. On completion of the alterations the owner in July, 1920, leased the factory to a tenant at a rent considerably in excess of the aggregate rents at which the three houses were let in August, 1914. The tenant claimed under s. 1 of the Increase of Rent, &c., Act, 1920, that the amount of that excess was irrecoverable.

Held, that, the structural alterations being such that the factory was a different thing from the three houses of which it was composed, the protection against increase of rent which each of those houses had

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individually enjoyed before the conversion was lost upon the conversion taking place ; that as the factory was first let as one building in July, 1920, the standard rent was the rent reserved by the lease then made ; that there was no earlier standard rent of which the reserved rent could be said to be an increase, and the statute consequently did not apply.

APPEAL from Clerkenwell County Court.

The defendant, Mrs. Barnett, was on August 3, 1914, the owner of three adjoining houses, Nos. 26, 28, and 30 Shepperton Road, in the parish of Islington. The houses were then dwelling houses with shops on the ground floor. They were respectively let at rents of 42*l.*, 52*l.* and 52*l.* per annum, and were of the respective rateable values of 35*l.*, 34*l.* and 34*l.*, the blank wall of one of the houses being separately let at a rent of 10*l.* and rated at 8*l.* In 1918 the houses had become vacant and the defendant, being in possession, threw the three houses together and converted them into one business building or factory. For that purpose she made openings in the two party walls on all floors ; removed the three staircases and put up in lieu one new staircase in a new position ; removed the old floors and made new ones, the ground floor being at a different level from the old ; removed the back additions containing sculleries and lavatories at the rear of the three houses ; built a new back addition containing basement and ground floor rooms on new foundations at the rear of two of the houses so as to enlarge the ground floor and basement accommodation. Where the party walls had been cut away new piers on new foundations were put in to strengthen the walls ; several new lavatories were constructed, making ten in all. By these alterations the cubic capacity of the building was increased by more than one-third of the cubic capacity of the three houses as they were before. Beyond these alterations and addition the structure of the three houses was not altered, and particularly the old foundations, the front and end wall, the back wall (except where the new addition joined the old building), and the roof, doorways and windows remained as before. These alterations were made at a cost of 206*l.* On their completion in 1920 the defendant by an indenture of lease dated July 8, 1920, let the premises to the plaintiffs, who carried on the business of ostrich feather

manufacturers, for a term of twenty-one years from June 24, 1920, at the annual rent of 700*l*. The parcels were described in the lease as "All those pieces of ground situate in and on the north-east side of Shepperton Road together with the messuages or tenements, shops and buildings erected thereon known as Nos. 26, 28 and 30 Shepperton Road aforesaid." The plaintiffs on the execution of the lease paid half a year's rent, 350*l*., in advance, and shortly afterwards brought this action in the county court under s. 14, sub-s. 1, of the Increase of Rent, &c., Act, 1920, to recover back so much of it as represented an unpermitted increase of the "standard rent." The defendant contended that as the premises in their altered form were first let in July, 1920, the statute did not apply; but if it did she claimed to set off under s. 2, sub-s. 1 (a), the sum of 123*l*., representing 6 per cent. on the money expended in the alteration.

The county court judge held that the individual houses having been before conversion protected against an increase of rent by the Increase of Rent, &c., Act, 1915, as the rateable value of no one of them exceeded the limit mentioned in that Act, they retained that protection even after the conversion, and that the Acts of 1915 and 1920 applied to the factory. With regard to the set-off he held that the defendant was not entitled to it as she had not served upon the plaintiffs a notice in the form in Sch. I. of the Act, as required by s. 3, sub-s. 2; he held the service of such a notice to be imperative, even though the premises being at the time unlet there was no tenant on whom the notice could be served. He accordingly gave judgment for the plaintiffs for 272*l*.

The defendant appealed.

Hon. S. O. Henn Collins for the defendant. The Increase of Rent, &c., Act, 1920, does not apply. In the first place the rent of the factory has not been increased within the meaning of s. 1, for it was never let until it was let to the plaintiffs. The three houses before they were converted had never been the subject of one demise at one entire

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rent. So that there was no earlier standard rent with which the rent reserved in the plaintiff's lease could be compared. By s. 12, sub-s. 1 (a): "The expression 'standard rent' means . . . in the case of a dwelling-house" (which term by s. 13 now includes business premises) "which was first let after the said third day of August, 1914, the rent at which it was first let." Therefore the rent reserved in the plaintiffs' lease is itself the standard rent. Secondly the alteration of the internal structure of the houses was so substantial as to amount to the "erection" of new premises, and s. 12, sub-s. 9, provides that "This Act shall not apply to a dwelling house (or business premises) erected after or in course of erection on April 2, 1919." Therefore on that ground also the Act has no application to this case. It is true that the county court judge found that the factory was not a "new building." But he apparently had in his mind the London Building Act. It is one question what is a new building under that Act, and quite another what is an erection of new premises within the Act of 1920. In any case the judge was wrong in holding that the 6 per cent. claimed on the expenditure could not be allowed. Sect. 3, sub-s. 2, in requiring the landlord to serve a notice of an intention to increase the rent (on the ground amongst others of expenditure on structural alterations) as a condition precedent to his right to demand such increase, must have meant that he should serve such notice where possible, and not that he should lose his right to demand the increase if there was no tenant on whom the notice could be served.

Foà for the plaintiffs. When once a house is protected under the Increase of Rent, &c., Acts, against the landlord's attempts to raise the rent it remains always protected; for the protection attaches to the house itself not to the tenant: *King v. York*. (1) As the Court there said: "The Act applied to houses, not to persons. The Act operated in rem, not in personam. It stereotyped the rent of a house." This is clear from s. 2, sub-s. 5, of the Increase of Rent, &c., Act, 1915 (re-enacted in s. 12, sub-s. 6, of the Act of 1920), which

(1) [1919] W. N. 59.

provides that "Where this Act has become applicable to any dwelling-house . . . it shall continue to apply thereto whether or not the dwelling-house continues to be a dwelling-house to which this Act applies." That being so the landlord cannot evade the provisions of the Act by combining two or more protected houses together in one letting, nor even by making substantial structural alterations if he leaves the main walls and roof standing. Nothing short of pulling down the house to its foundations and re-erecting it afresh will bring the case within s. 12, sub-s. 9, and thereby exclude the operation of the Act. In *Woodward v. Samuels* (1), a case which arose under the Act of 1915, it was held that where a house was converted into flats, the individual flats were not distinct things from the house out of which they were carved, so as to make it possible to say that they were "first let" at a date subsequent to the conversion. The Court there said: "If a house was pulled down and rebuilt since August, 1914, the standard rent would be the rent at which the new building was first let, but it was otherwise with the conversion of an existing building into flats." Similarly the conversion, as in the present case, of several houses into one factory does not make the combination a distinct thing from the constituent houses, and it consequently cannot be said that this factory was first let in July, 1920. Indeed this is an a fortiori case, for *Woodward v. Samuels* (1) was decided as it was notwithstanding that the effect of the alteration there was to increase the number of dwelling houses, which was one of the very things that these Acts were designed to encourage; whereas here the effect of the alteration is exactly the opposite, it diminishes the number of dwelling houses. To meet the decision in *Woodward v. Samuels* (1) the law was altered by s. 12, sub-s. 9, of the Act of 1920, which provides that the Act shall not apply to a dwelling house which since April 2, 1919, has been converted into two or more separate flats. But as the law now stands the two cases of the complete pulling down and rebuilding of a house and the conversion of a house into flats are the only cases in which the structural

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alteration of a house once protected can take it out of the operation of the Act.

Henn Collins was not called on to reply.

BRAY J. In this case there were in August, 1914, three separate dwelling houses with shops below, which belonged to the defendant and were let at rents amounting in the aggregate to 156*l.*, inclusive of a sum of 10*l.*, the rent of the side wall of one of the houses on which advertisements were posted. In 1918 the defendant came into vacant possession of these houses, and conceived the idea of turning them into a factory. Accordingly she practically gutted the houses and took out the staircases and the floors, but left the outside walls standing. When the alterations, upon which she had spent upwards of 2000*l.*, were completed she let them to the plaintiffs at a rent of 700*l.* The plaintiffs who by the terms of the lease were required so to do, paid the first half-year's rent, 350*l.*, immediately upon its execution. They subsequently brought this action to recover back the amount by which the 350*l.* paid exceeded a half-year's standard rent of the premises. The county court judge gave judgment for the plaintiffs for 272*l.*, and the question is whether he was right in so doing. I should certainly be astonished if I found that the Act really applied to a case of this kind, and should require very clear language to convince me that it did. The question arises under the Increase of Rent, &c., Act, 1920. The earlier Acts applied only to dwelling houses, but the operation of the Act of 1920 was extended to business premises by s. 13, sub-s. 1, which says: "This Act shall apply to any premises used for business trade or professional purposes . . . as it applies to a dwelling-house." Then s. 1 provides that "Where the rent of any dwelling-house" or business premises "to which this Act applies . . . has been since March 25, 1920, or is hereafter, increased, then, if the increased rent . . . exceeds by more than the amount permitted under this Act the standard rent . . . the amount of such excess shall . . . be irrecoverable from the tenant," and if it has already been paid by the tenant it may be recovered back

from the landlord under s. 14. That obviously refers to an increase of the rent of one and the same building, and in my opinion the factory as it now exists is not the same building as was upon the site in August, 1914. Then s. 12, sub-s. 1 (a), defines "standard rent" in the case of a dwelling house or business premises first let after August 3, 1914, as "the rent at which it was first let." But this factory was first let in July, 1920, and the rent which the plaintiffs now seek to recover was in fact the standard rent. We were referred by counsel for the plaintiffs to s. 12, sub-s. 6, which says that: "Where the Act has become applicable to any dwelling-house . . . it shall continue to apply thereto whether or not the dwelling-house continues to be one to which this Act applies"; but that must mean that the Act is to apply to the house if it continues to be the same house, it cannot mean that if the whole character of the premises is altered so that it is no longer possible to say that the premises are the same the Act is still to apply. There is one other sub-section which I ought to mention, which was relied upon by the defendant: s. 12, sub-s. 9. It was said that the conversion of the three houses into a factory amounted to an "erection" of a building within the meaning of that sub-section. The county court judge held that it did not. I am not prepared to say that I entirely agree with him in that view, but it is unnecessary to decide the point. For the reasons I have given I think that the standard rent of the factory has not been increased, and the judgment appealed from must accordingly be reversed.

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LUSH J. I agree. This Act, like the preceding ones for which it is substituted, was passed to protect the tenant of a small house from having his rent increased. Increase necessarily involves a comparison between two figures. One cannot talk of the rent of a house being increased unless it was the subject of a different rent at some previous time. In this case the question is, Has this factory ever been the subject of a smaller rent than that which the landlord now seeks to charge? The moment one asks oneself that question one

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sees that the answer must be No. There never was a rent charged for this factory until the lease was granted in July, 1920, for the simple reason that until shortly before that date the factory had no existence. It seems to me impossible to say that because rents were charged for three small houses some years ago and those three small houses have been converted, with substantial additions, into one large house, therefore you can compare the rent of the new large building with the aggregate of the rents of the three small ones. They are not the same house, and if they are not the same it cannot be said that the rents of the three small houses have been increased. The county court judge has assumed, and in my opinion wrongly, that s. 12, sub-s. 9, is exhaustive of the cases in which the structural alteration of a house will prevent the application of the Act. It may be that he was right in saying that what was done here did not amount to the erection of a new house, but even so it remains necessary to consider whether the house after alteration remains the same house so as to leave it possible to be said that its rent has been increased. Upon the evidence before the judge it seems to me manifest that this is a case in which there has been such a substantial alteration as to make it impossible to say that there is any identity between the three houses and the factory into which they were converted. I do not say that any trifling alteration of a house would be destructive of its identity. It must be a question of degree. But in this case I think it is clear that the houses are not the same. Therefore I think the county court judge was wrong.

Appeal allowed.

Solicitor for the appellant : *H. A. Phillips.*

Solicitor for the respondents : *A. D. Vandamm.*

J. F. C.

WRIGHTSON *v.* McARTHUR AND HUTCHISONS (1919),
 LIMITED.

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 March 10, 21.

[1920. W. 3067.]

Company—Charge—Chattels stored in Room of Warehouse as Security—Delivery of Key of Room—Licence to enter Warehouse and remove Goods—Delivery of Possession of Goods—Letters recording Transactions—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 93, sub-s. 1 (c).

The defendant company, in order to secure the plaintiff against loss on a certain contract and in consideration of the plaintiff giving further time within which to pay for the goods, set aside certain specified goods in two rooms in the defendants' premises which were locked up, and the keys handed to the plaintiff, no other goods being in those two rooms. The terms of the transaction were recorded in two letters written by the defendant company to the plaintiff, one letter written before the keys were handed over, and the second letter subsequently. The last letter contained the words: "The goods to be locked up, the keys in your possession, and you to have the right to remove same as desired." The company went into liquidation and the liquidator claimed that the transaction was invalid under s. 93, sub-s. 1 (c), of the Companies (Consolidation) Act, 1908, as being a charge created or evidenced by an instrument which if executed by an individual would require registration as a bill of sale. The plaintiff brought an action claiming a declaration that the goods were in his possession, and that he was entitled to remove them:—

Held, that possession of the goods passed to the plaintiff by the delivery of the keys of the rooms in which they were locked up, notwithstanding that those rooms were on the defendants' premises, inasmuch as the defendants had conferred upon the plaintiff a licence to make the necessary entry in order to use the keys, which licence could not be revoked, and that therefore the transaction was valid as against the liquidator and the plaintiff was entitled to remove the goods.

ACTION tried by Rowlatt J.

By a contract dated March 19, 1920, the defendant McArthur bought of the plaintiff 45,430 yards of fast black mercerised Venetian lining at 6s. 8d. per yard, the total price amounting to 15,143*l.* 10s. The delivery was to be spread over a period of four months, and the goods were to be paid for by net cash on delivery, and during the period of four months interest at the rate of 7½ per cent. was to be paid on the amount owing. The plaintiff alleged that the defendant McArthur failed to take delivery of the goods in accordance

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with the contract, and claimed to recover damages for breach of contract. The defendant McArthur made default in pleading, and it was ordered that damages should be assessed against him at the trial. Rowlatt J. assessed the damages at the difference between the contract price of 15,143*l.* 10*s.*, together with interest at 7½ per cent. up to the date of final breach—namely, for six months—and the market price of the material at 3*s.* 3*d.* per yard amounting to 7382*l.* 10*s.* The damages were accordingly assessed at 8330*l.* 10*s.*

The plaintiff alleged that the defendant McArthur bought the goods for the purpose of fulfilling an order from the defendant company, Hutchison's (1919), Ld.; and that the defendant company on August 25, 1920, in consideration of the plaintiff extending the time for delivery to McArthur under the contract agreed to set aside certain goods and place them at the disposal of the plaintiff as security for the performance by McArthur of the contract, and that the defendant company on August 30 set aside and appropriated to the agreement those goods. The plaintiff claimed against that company a declaration that certain goods comprised in certain stock sheets were the property of the plaintiff, or alternatively were in the possession of the plaintiff, and that the plaintiff was entitled to remove them; or in the further alternative that the goods were held by the defendant company for and on behalf of the plaintiff as security for the performance of the contract by McArthur dated March 19, 1920, referred to above.

The following statement of facts is taken from the judgment :
“ The defendant company were minded, for reasons and under circumstances which I need not go into, to give the plaintiff security on goods of their own against loss which he might suffer owing to the non-performance by the defendant McArthur of the contract in respect of which I have just assessed damages against him. Under these circumstances there was a series of interviews between the plaintiff and, in the first instance, the whole board of directors of the defendant company and later representatives of the board who acted for the others, at which the necessary arrangements

were made. What took place was faithfully recorded in writing in two letters of August 25 and one of August 30, 1920. The first of these documents, a letter by the managing director of the defendant company to the plaintiff, was handed to him in order that he might consult his bank upon it. The next letter from the plaintiff to the company on the same day records that he has done so, and that he is able to agree to the proposal. This proposal was that in consideration of two months' further time the company would lay aside 5000*l.* worth of goods as security for the due performance of the contract, and in the second of the two letters above mentioned, in which the plaintiff accepts it, he suggests that a valuer should be agreed to approve the security, and that arrangements will have to be made to remove the goods to an approved warehouse. On August 30 the plaintiff and his valuer went to the company's offices where they saw the stock sheets containing the goods—namely, a quantity of sylko, some buttons and thread—intended to form the security. This having been approved the plaintiff his valuer and the managing director went into the basement and saw the sylko in a compartment there. The door of the compartment had no key and was apparently broken, but it was arranged that the door should be repaired, a key provided, and that the goods should be locked up in the compartment and the key handed to the plaintiff's valuer on his behalf. This was duly done in the course of a day or two. The parties then went to some other premises of the company and in a room there saw the buttons and thread which had been mentioned in the stock sheets. The door of that room was locked and the key handed to the plaintiff or his valuer. There were no other goods locked up either with the sylko or with the buttons and the thread. It will be observed that the parties had abandoned the idea of removing the goods to an approved warehouse and had substituted this plan of locking them up in separate compartments on the defendants' premises. It was to save trouble in the event of the company being able to redeem the goods in whole or in part. After this the parties returned to the offices and then—namely, after

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this transaction—the letter of August 30 was given by the managing director to the plaintiff. The terms of the letter treat the setting aside of the goods, and so on, as things to be done in the future. In fact they had already taken place. The last words of this letter are ‘you to have the right to remove same [i.e., goods] as desired.’ ”

The defendant company went into voluntary liquidation and the liquidator refused to allow the plaintiff to enter the rooms and remove the goods. He alleged that the agreement, if made with the company, was invalid as against him under s. 93, sub-s. 1 (c), of the Companies (Consolidation) Act, 1908 (1), as being a charge created on evidence by an instrument which if executed by an individual would require registration as a bill of sale.

The following are the three letters referred to in the above statement of facts. On August 25 the managing director of Hutchisons (1919), Ltd., wrote to the plaintiff as follows: “Dear Sir,—In confirmation of the conversation you have had with my directors to-day, we agree to lay aside stock to the amount of 5000*l.* (five thousand pounds) as additional security for the due performance of the contract made with you for the purchase of Venetian linings, in consideration that you will allow us an additional period of two months for the payment of the amount owing.”

The plaintiff on the same day wrote to the defendant

(1) Companies (Consolidation) Act, 1908, s. 93, sub-s. 1: “Every mortgage or charge created after the first day of July nineteen hundred and eight by a company registered in England or Ireland and being either—

(c) A mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale;

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor

of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, are delivered to or received by the registrar of companies for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable.”

company as follows : "Dear Sirs,—‘Venetian linings.’ In reply to your letter of to-day’s date offering to lay aside stock to the amount of 5000*l.* as additional security for the due performance of this contract in consideration of an additional time limit of two months. I have to inform you that I have consulted the Royal Bank of Scotland on the proposal. I am now able to agree this proposition and to ask you to make a list of the proposed securities forthwith. We will then mutually agree to a valuer to approve the security and arrangements will then be made to remove the goods to an approved warehouse (unless we can arrange for you to retain the goods under conditions agreeable to the parties concerned). Any costs will naturally fall to your account, and I have to ask you to have the list prepared by 11 A.M. Friday, August 27, 1920."

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On August 30, 1920, the managing director of the defendant company wrote to the plaintiff as follows : "Dear Sir,—Referring to our recent agreement to set aside 5000*l.* worth stock as security for the due performance of your contract, I hereby agree to set aside the goods listed on stock sheet No. 38 referring to 160,000 cops Dewhurst No. 18 Sylko packed in thirty-two cases, and also the goods listed on stock sheets No. 39 to 51 referring to various threads and buttons, copies attached. The goods to be locked up, the keys in your possession, and you to have the right to remove same as desired."

Hawke K.C. and *Harold Morris K.C.* for the plaintiff.

Holman Gregory K.C. and *E. F. Spence* for the defendant company. The letters of August 25 and 30 from the defendant company contain the terms of a charge, and if they had been executed by an individual would require to be registered as a bill of sale under the Bills of Sale Act, 1878 (1), and therefore, as they have not been registered with the registrar of companies,

(1) Bills of Sale Act, 1878, s. 4: ".... The expression ‘bill of sale’ shall include any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon shall be conferred."

1921 the charge evidenced by those letters is void as against the liquidator of the company under s. 93, sub-s. 1 (c), of the Companies (Consolidation) Act, 1908. (1) It is clear from the evidence that the agreement for the deposit of these goods as security was a written and not an oral agreement. Even if there was an oral agreement, as it was subsequently reduced to writing, the rights of the parties must depend on the written document: *Charlesworth v. Mills*. (2) Whenever an article is handed over in pledge in accordance with the terms of a written agreement, and it is necessary to refer to the document in order to ascertain the terms of the pledge, that agreement is a bill of sale, and unless it is registered accordingly the pledge is void. These letters come within the definition of a bill of sale in the Bills of Sale Act as being an agreement "by which a right in equity to any personal chattels, or to any charge or security thereon shall be conferred": *Dublin City Distillery v. Doherty*. (3)

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[ROWLATT J. referred to *Ex parte Hubbard*. (4)]

In that case the document was not a bill of sale, as possession of the goods had been already taken by the pledgee. This transaction was not a pledge. A pledge is defined in *Coggs v. Bernard* (5) as "when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor." In the present case there was no debt or sum certain to be secured by the deposit of these goods; it was merely a deposit against the contingency of a possible loss on the McArthur contract. The agreement therefore conferred merely a right in equity to a charge on personal chattels. The possession of these goods was not given to the plaintiff so as to pass the property in them. They were only set apart and locked up in the possession of the defendants themselves, so that they should not deal with them. The plaintiff could not enter the building in which the locked rooms were without the defendant company's consent.

Hawke K.C. in reply. Neither of the letters of August 25

(1) See note (1) ante, p. 810.

(3) [1914] A. C. 823.

(2) [1892] A. C. 231, 239.

(4) (1886) 17 Q. B. D. 690.

(5) (1703) 2 Ld. Raym. 909, 913.

or 30 amounted to a bill of sale. In order that a document should be a bill of sale it must be the assurance passing the property in the goods. The letter of August 25 did not assign anything, and the letter of August 30 stating the terms upon which the goods were handed over was written after the possession of the goods had passed to the plaintiff by the delivery of the keys of the rooms in which they were locked up. It is not necessary, however, for the plaintiff to rely upon that document; he could rely upon the oral agreement and the fact that the possession of the goods had passed to him: see *Ex parte Hubbard*. (1) The Bills of Sale Acts do not attack transactions but merely documents; a pledge in which the possession has passed to the pledgee does not come within the definition of a "bill of sale" in those Acts. The defendants were not in possession of the goods after they had put it out of their power to touch them, by handing to the plaintiff the keys of the rooms where they were. The fact that the rooms in which the goods were stored were in the defendant's warehouse is immaterial, as the plaintiff was at liberty to go there, although perhaps he could only do so within certain hours. *Hilton v. Tucker* (2) is a strong authority in the plaintiff's favour.

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Cur. adv. vult.

March 21. ROWLATT J. read the following judgment: In this case the claim against the defendant McArthur was for non-acceptance of goods. Having made default in pleading it was ordered that damages should be assessed at the trial, and I assess them at the difference between the contract price of 15,143*l.* 10*s.* plus interest at 7½ per cent., which fall to be added to the price according to the terms of the contract, calculated for six months, that is to the date of the final breach and making 569*l.* 10*s.*, and the market price of 3*s.* 3*d.* The contract price, including interest, is 15,713*l.*, the market price is 7382*l.* 10*s.*, making the difference 8330*l.* 10*s.*

As against the second defendants the question was whether the plaintiff is entitled to hold certain goods as security

(1) 17 Q. B. D. 690.

(2) (1888) 39 Ch. D. 669.

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for his loss on this contract. The defendant company are in liquidation and the liquidator contends that the security is void as against him under s. 93, sub-s. 1 (c), of the Companies (Consolidation) Act, 1908, as being a charge created or evidenced by an instrument which if executed by an individual would require registration as a bill of sale. I am remitted therefore to the definition of "bill of sale" in the Bills of Sale Act, 1878, to determine whether the security is valid or not. The facts of the case, which are not in dispute, can be stated for the present purpose extremely shortly. [His Lordship then read the statement of facts set out above.] The contention of the defendant company is that each of the three letters, or, at any rate, the letter of August 30, which is the operative one, are instruments which evidence a charge and would, if executed by an individual, require registration as a bill of sale, and therefore the charge is void against the liquidator under the section already mentioned.

It was contended by Mr. Hawke for the plaintiff, if I understand him aright, that as there was a verbal arrangement to the same effect as the written, then if the written arrangement is void as a bill of sale the verbal arrangement can be treated as taking its place, and that that is not within the statute. That in my view is wholly unmaintainable. The document supersedes the conversation. If authority is wanted it may be found in *Morris v. Delobbel-Flipo* (1) per Stirling J. citing *Ex parte Parsons*. (2) This line of argument rests upon a misapprehension of such passages in the authorities as that in *Ex parte Hubbard* (3), where Bowen L.J. says: "It may often happen that the transaction will stand by its own strength, even if the document is avoided." The Lord Justice was not speaking of identical arrangements, one verbal and one written. He was speaking of a document on the one hand, and on the other a transaction not resting merely on words, spoken or written, but on acts like a pledge with possession given.

Mr. Gregory for the defendants went to the other extreme.

(1) [1892] 2 Ch. 352.

(2) (1886) 16 Q. B. D. 532.

(3) 17 Q. B. D. 690, 698.

He contended that whenever the terms of a pledge are committed to writing, though the pledge is completed with possession, the writing is a bill of sale and the pledge is bad. This seems to me to err as gravely as Mr. Hawke's contention, though in the opposite direction. The special property of a pledgee, as shown by Bowen L.J. in the judgment already referred to, exists by virtue of the act of delivery, not by virtue of the document. The point is neatly illustrated by the observations of Lord Parker in *Dublin City Distillery v. Doherty* (1), where he lays it down that where no possession physically is given to complete a common law pledge, but a document is used to pass the possession and complete the pledge, such document is within the definition, unless, of course, it falls within the special exceptions named at the end of the section. It is often said generally that a pledge is not within the definition—indeed Mr. Hawke said so frequently in the course of the argument—but, as Lord Parker's dictum shows, that general statement is not accurate. What is accurate is that where the passing of property, special or general, is effected by actual delivery of possession (as truly enough it usually but not invariably is in cases of pledge) any accompanying document does not have the effect of any such instrument as is described by the section.

For the above reasons it seems to me that if the delivery of the keys of the rooms in which the goods now in question were locked up is to be regarded as passing the possession the security intended to be created is valid, and the question in the case is whether possession did pass. But before I consider that I must deal with another argument presented by Mr. Gregory. He urged that this was not a transaction of pledge as there was no sum certain presently payable to be secured by it, and there might never be any sum payable, and that the document was an agreement conferring a right in equity to a charge on personal chattels within the definition. As already indicated, I do not think that whether a case falls or does not fall within the statute depends on whether it can be said that there is not or is a pledge. There is no

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(1) [1914] A. C. 855.

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exception of pledges *eo nomine*. What does escape the statute is a right conferred not by a document, but by delivery of possession. But Mr. Gregory argued that here it was only a right in equity because, assuming possession, the plaintiff had not either the general property or the special property of a pledgee for a liquidated debt. I can only say that I fail to understand why the right of the plaintiff, assuming he is to be treated as in possession, to retain that possession by way of security is not to be treated as a common law right. The decision of Stirling J. in *Morris v. Delobel-Flipo* (1), already referred to, is directly in point, and I can only imagine that the learned counsel must have been thinking of the limited forms of legal estates in real property.

The point to which this case is now reduced is whether the circumstance that the rooms, the keys of which were delivered, were within the defendants' premises, prevents the delivery of the keys conferring possession of the contents of the rooms. If the keys delivered had been the outside key of the whole warehouse containing these goods I should have felt no difficulty, nor should I have felt any difficulty had the key been of an apartment or receptacle in the premises of a third party as was the case in *Hilton v. Tucker*. (2) On the other hand if, the rooms being in the defendants' premises, the keys had been given without the licence to go and remove the goods at any time I should have thought it clear that possession of the goods did not pass. It would be merely a case of the goods remaining in the defendants' possession with the security that they should not be interfered with, but without any power of affirmative control at the free will of the plaintiff. It would be like the case of furniture left in a locked room in a house that is let furnished, where the lessor has no right to enter except upon reasonable notice and at reasonable times. The actual question has to be considered in the light of the principle that delivery of a key has effect not as symbolic delivery, but as giving the actual control. This was the view expressed by Lord Hardwicke in *Ward v. Turner* (3), where

(1) [1892] 2 Ch. 352.

(2) 39 Ch. D. 669.

(3) (1752) 2 Ves. Sen. 431.

he says the key is the means of coming at the possession. The matter was fully discussed in the light of all the cases in Pollock and Wright on Possession in the Common Law, p. 61 and following pages. In *Hilton v. Tucker* (1), already referred to, in a judgment delivered since the date of that work, Kekewich J. observes "that the delivery of the key in order to make constructive possession must be under such circumstances that it really does pass the full control of the place to which admission is to be gained by means of the key." If I might criticise that statement my criticism would only be as to the propriety of the use of the word "constructive" in the connection in question.

I think therefore there can be no doubt as to the true principle, and the difficulty is in its application. There are two cases in which delivery of the key of a box in a house has been held to confer possession of the contents. The first was *Jones v. Selby* (2), referred to by Lord Hardwicke in *Ward v. Turner* (3) above mentioned, the other was *Mustapha v. Wedlake* (4), but in both those cases both parties were living in the house and therefore the person receiving the delivery could not be expected to take away the box, but could hold possession of it in the house. It has never been held, so far as I know, that delivery of the key of a box which the deliverer retains in his own house, where the other party does not live, passes possession of the contents. Upon the whole, however, I think that in the case before me the possession was transferred, having regard to the fact that a licence to come and make the necessary entry to use the key was also conferred, a licence which it seems to me could not be revoked. The door into the building would be open in business hours, and the mere fact that the plaintiff might wrongfully be excluded from the whole building does not, I think, affect the matter. If the key had been given him with the intention to pass to him the possession of the room itself upon a demise of it, I cannot doubt that possession would pass. I see no difference when the key is given to pass possession

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(1) 39 Ch. D. 669, 676.

(3) 2 Ves. Sen. 431, 441.

(2) (1710) Prec. in Ch. 300.

(4) [1891] W. N. 201.

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not of the room, but of the chattels. The key guards both in the same way.

I have only to add that some argument was addressed to me on both sides as to the effect of what was done upon the defendants' ability to obtain credit on the strength of these goods. I do not think that is the test, though considerations of that kind no doubt largely inspired the Bills of Sale Acts. The question is whether one can find a transfer by a common law pledge which involves the question of a common law delivery of possession. For these reasons I give judgment for the plaintiff for the declaration asked for in the second alternative, including power to remove, with costs.

Judgment for plaintiff.

Solicitors for plaintiff: *Devonshire, Monkland & Co.*

Solicitors for defendant company: *Downer & Johnson.*

R. F. S.

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 April 19.

STONEHOUSE v. MASSON.

Criminal Law—Vagrancy—Professing to tell Fortunes—No Finding of mala fides—Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4.

The offence under s. 4 of the Vagrancy Act, 1824, of professing to tell fortunes is complete without any allegation or proof that the defendant did not believe in the possession of the powers claimed. Merely to tell fortunes is an offence in itself, whatever the state of mind of the defendant.

Davis v. Curry [1918] 1 K. B. 109 not followed.

CASE stated by a Metropolitan Police Magistrate.

At a Court of summary jurisdiction sitting at Marylebone, an information was preferred by the respondent, Inspector William Masson, under s. 4 of the Vagrancy Act, 1824 (5 Geo. 4, c. 83), against the appellant, Jean Stonehouse, for that she, on October 20, 1920, at 11, Oppidans Road, Primrose Hill, did pretend (afterwards struck out by the magistrate and amended to "profess") to tell fortunes with intent to deceive

and impose on two of His Majesty's subjects ; and a further information was preferred by the respondent under 11 & 12 Vict. c. 43, s. 5, and the Vagrancy Act, 1824, s. 4, against the appellant Kate Smyth, for that she, on the same date and at the same place, did aid and abet the appellant Stonehouse. Upon the hearing the following facts were proved or admitted.

The appellant Smyth was a widow, and rented a flat at 11, Oppidans Road. The appellant Stonehouse was a spinster, and had resided with Smyth for the last three years. They described themselves as spiritualists. On each day from September 4 to 11, 1920, except September 6, women were seen to go to 11, Oppidans Road, and ask for Stonehouse, and were shown upstairs by Smyth. On October 4, 1920, Eleanor Parry, woman patrol, spinster, and Minnie Kemp, woman patrol, married woman, called at 11, Oppidans Road ; Smyth opened the door. Parry asked if the lady who told fortunes lived there. Smyth said " Yes," and added, " We only tell fortunes by appointment. Will you make an appointment by letter. Don't mention the fortunes in writing. We are not allowed by law to tell fortunes, and it might mean prison for us." On October 20, 1920, Parry and Kemp went to 11, Oppidans Road. Smyth opened the door and said, " Are you Mrs. Parry and Miss Kemp ? " Parry answered " Yes." Smyth showed them in turn into a room where Stonehouse was reclining on a sofa, and each saw Stonehouse alone. Parry was wearing a wedding ring lent by Kemp. To both women Stonehouse, after shuffling cards, consulting a small book and asking the dates of their births, told a great deal of their past which was entirely erroneous, mistaking the married woman for the single and vice versa, and a good deal of the future. Each paid a fee of 2s. 6d.

The appellant Stonehouse gave evidence on her own behalf. She said : " There is nothing outside to show I tell fortunes, and I do not advertise ; I have no need to do so. I do it by psychometry. I get the conditions of the people through the magnetism by the cards, the glove or anything that is worn by persons. I gave them the cards to shuffle in order to get the magnetism. I also do it by a piece of hair. I am

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also born with the gift of second sight which enables me to see the spirit forms around me, and I also get communications from the other side. I have comforted people who contemplated suicide with such messages. I was a music teacher, but am now a cripple ; I haven't been out for three years. I honestly believe and I have convinced people that I can foresee their future and also see their past."

In cross-examination she said : " I told these ladies' fortunes by magnetism and by second sight. I used the same pack of cards for each. The magnetism never makes mistakes. I certainly scented something about these women. They were most uninteresting, and they didn't seem to be taking much notice. What they say is all lies. If I told the witness Parry she had a little girl of six, I saw the child clairvoyantly. Probably she has such a child. I have a little white book and I study astrology. I am sure that what is in the book is true. I have proved it. Generally it is true. I don't know that it is ever wrong. The book is founded on the ruling planets."

The appellant Smyth also gave evidence. She stated that she believed in second sight, and believed that the appellant Stonehouse had the powers she claimed. She used to open the door because Stonehouse could not get downstairs. She further said : " If you have the gift it doesn't matter what medium you use—cards or anything—none at all would do if she just held the person's hand. People have told me they were astonished at what she told them." Stonehouse gave her half what she earned for her board. It might be 10s. a week or in a good week 1l. In cross-examination she said : " It isn't fortune telling, it is clairvoyance."

Evidence was also given on behalf of the appellants by persons who had had interviews with Stonehouse on other occasions. Fanny Amelia Dixon, a married woman, said : " I have known Miss Stonehouse five or six years, and have often visited her. All she has told me has been true. In June, 1915, she foretold my mother would have a serious illness and I would be fetched in the night. It happened on the last Friday in the old year, as she said. I don't consider I have been imposed upon or deceived. She foretold a serious

illness of my husband and about my sister-in-law dying.”
Georgette Raymond, a married woman, said : “ I have known Miss Stonehouse for years. I have visited her regularly, and often have my fortune told when I feel inclined—perhaps once a month or even more. I have not been imposed upon. What she has told me has turned out true. On one occasion she saw a friend of mine behind me who died four years ago. I have acted on her advice and improved my circumstances.”

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For the appellants it was contended that to constitute the offence of pretending or professing to tell fortunes it was necessary to show an intention to deceive or impose upon.

The magistrate was of opinion that on their ordinary interpretation the words “ professing to tell fortunes,” whether they believed in what had been described before him or not, brought the appellants within the principle of s. 4 of the Vagrancy Act, 1824. He added : “ I could not say on the evidence before me whether the appellants believed in Stonehouse’s statements or not,” but he held that, in the same way as the two women, Fanny Amelia Dixon and Georgette Raymond, called for the defence, had been induced to believe her statements, whereby the very mischief aimed at by the statute had been perpetrated, so there had been an intent on the part of the appellants to make the women, Eleanor Parry and Minnie Kemp, believe in her statements to them, erroneous as they in fact were, and whereby they would have been deceived had they believed in them. He therefore convicted the appellants and ordered each of them to pay a fine of 5*l.*, or in default to be imprisoned for one month, but stated this case. The question for the Court was whether upon the above facts the magistrate came to a correct determination in point of law.

J. P. Eddy for the appellant. The conviction of the appellants was wrong, because there was no finding that they told the fortunes with intent to deceive. To justify a conviction there must be a finding to that effect, for the words in s. 4 of the Vagrancy Act, 1824 (1) “ to deceive and impose

(1) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4: “ Every person . . .

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on any of His Majesty's subjects" apply to "pretending or professing to tell fortunes" as well as to the rest of the section: per the Lord Justice-Clerk in *Smith v. Neilson*. (1) The mere telling of fortunes is not in itself an offence. From the observations of Denman J. in *Penny v. Hanson* (2) it would seem that if it had been shown in that case that the defendant believed in his claims the decision might have been different. *Davis v. Curry* (3) is a clear decision in favour of the appellants, for it was held by the majority of the Court that an intent to deceive must be proved. *Reg. v. Entwistle* (4) decided that there must be an intent to deceive, but that it need not be alleged, and Channell J. said in effect that if there was no deceit there could be no offence. The two women in the present case were not deceived, because they knew that Stonehouse's statements regarding them were untrue; therefore there was no deceit. The fact that the appellants took money for telling the fortunes is not material, for the statute makes no such distinction. Many people tell fortunes seriously but not for money. If the respondent is right, then intent to deceive must be shown in the case of a palmist, but not in that of a fortune teller; and that cannot have been intended. *Mens rea*, a guilty mind, must be proved according to the general rule of English law, unless the contrary be expressed: per Lord Russell of Killowen C.J. in *Williamson v. Norris*. (5)

[AVORY J. referred to *Rex v. Wheat and Stocks*. (6)]

[*Monck v. Hilton* (7) was also referred to.]

Artemus Jones K.C. and *H. D. Roome* for the respondent. The real question is whether the words "to deceive and impose on" form part of the statutory definition of the offence of fortune telling in s. 4 of the Act of 1824. It is submitted that they do not, but apply only to the second offence of "using any subtle craft, means, or device, by palmistry or

pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects . . . shall be deemed a rogue and vagabond."

(1) (1896) 23 R. (J. C.) 77, 78.

(2) (1887) 18 Q. B. D. 478, 480.

(3) [1918] 1 K. B. 109.

(4) [1899] 1 Q. B. 846.

(5) [1899] 1 Q. B. 7, 14.

(6) [1921] 2 K. B. 119.

(7) (1877) 2 Ex. D. 268.

otherwise." The mischief aimed at was the imposition practised upon the ignorant and credulous by professional fortune tellers.

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The words of s. 4 of the Act of 1824 have been taken substantially from earlier statutes—namely, 39 Eliz. c. 4, s. 2 (1597), 17 Geo. 2, c. 5, s. 2 (1744), and 3 Geo. 4, c. 40, s. 3 (1822)—and an examination of these, and the position therein of the words "pretending to tell fortunes," relatively to the other words, shows that the offence was complete without any allegation of an intent to deceive. This was the view always taken until *Davis v. Curry* (1), and it is contended that the dissenting judgment of Avory J. in that case was right. Both Cleasby B. and Pollock B. in *Monck v. Hilton* (2) laid it down that the very act of pretending to tell fortunes imports that deception is practised. See also the judgments of Denman J. in *Penny v. Hanson* (3), and of Darling J. and Channell J. in *Reg. v. Entwistle*. (4) The Scotch case of *Smith v. Neilson* (5) is to the contrary effect, but in that case it was conceded that neither the fortune teller nor the person whose fortune was told believed in fortune telling (6), so that it was a case outside the mischief of the Act. *Davis v. Curry* (1) was decided without reference to the earlier statutes, and, moreover, Darling J. and Sankey J. were misled by the punctuation marks inserted by the printer of the Act. But these marks, previous to 1849, formed no part of the statute.

It is to be observed that by s. 4 of the Witchcraft Act, 1736 (9 Geo. 2, c. 5), which is still in force, "If any person shall . . . undertake to tell fortunes" he is guilty of an offence, an intent to deceive not being an ingredient thereof.

Eddy replied.

LAWRENCE C.J. This special case raises the question whether it was necessary for the magistrate to find that the appellants, who were charged with professing to tell fortunes, believed that they were actually able to tell fortunes or not.

(1) [1918] 1 K. B. 109.

(2) 2 Ex. D. 268, 276, 278.

(3) 18 Q. B. D. 478, 480.

(4) [1899] 1 Q. B. 846, 850, 851.

(5) 23 R. (J. C.) 77.

(6) *Ibid.* 79, per Lord Young.

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The charge was brought under s. 4 of the Vagrancy Act, 1824, which enacts that: "Every person . . . pretending or professing to tell fortunes . . . shall be deemed a rogue and vagabond." The appellants were charged only with "professing" to tell fortunes; the information originally charged that they "pretended" to do so with intent "to deceive and impose on" His Majesty's subjects, but the magistrate altered "pretend" to "profess" and declined to determine whether they had so intended, and said that on the evidence he could not say whether they believed they were able to tell fortunes or not, but he found that they did make the statements deposed to when telling the fortunes of the two women intending those women to believe them. I cannot imagine why he hesitated to find that the appellants did intend to deceive, but that is the point at which he paused. Now the question is whether it was necessary that he should find in so many words an intent to deceive. I do not think it was necessary. As I say, I am astonished that the magistrate did not find the intent, because I cannot imagine anybody holding himself out to tell fortunes for money who does not perfectly well know that he is deceiving and that he intends to deceive. I entirely agree with the proposition that as a general rule there must be *mens rea*, but that is not true of every offence created by statute. Whenever an Act is passed for the protection of the community against some evil influence, physical or intellectual, *mens rea* is not always necessary; there is a number of cases to that effect. This appears to be one of them, and I think it is so partly from the framing of the statute with which we are dealing, and partly from that of the statutes which it replaces. There is a series of these from 39 Eliz. c. 4 down to the Vagrancy Act, 1824, dealing with this question of fortune telling, and they all use very similar language. The words in the Act of 1824 which are relied on appear to have been derived from s. 2 of 17 Geo. 2, c. 5, which first introduces the words "to deceive and impose on any of His Majesty's subjects," but those words do not qualify the "pretending to have skill in physiognomy, palm-istry, or like crafty science, or pretending to tell fortunes."

One has to go back to 39 Eliz. c. 4 to see that telling fortunes was considered at that date a fantastic imagination. By s. 2 : 1921
 "All persons . . . pretending that they can tell destenyes fortunes or such other like fantasticall ymagynacions" STONEHOUSE
 are to be deemed rogues and vagabonds. That statute v.
 treats the telling of fortunes in itself as a fantastical MASSON.
 imagination, and all the subsequent statutes dealing with Lawrence C.J.
 the matter treat pretending to tell fortunes as in itself an offence.

Our attention has been called to cases in which it has been said that the Court cannot go the length of holding that all cases of fortune telling are within the statute. It may be, as Darling J. pointed out in *Reg. v. Entwistle* (1), that a person might tell fortunes without committing an offence if he said : "I am not a real fortune teller ; I cannot tell fortunes ; what I am about to tell you must not deceive in any way, but I will pretend or profess to tell your fortune by the use of the ordinary means which people use to tell fortunes." But when a person professes to be a fortune teller for reward it appears to me that he is professing to tell fortunes truly. That is the state of things which the statute aims at, and says that it is a public mischief, because it affects the lives and happiness of members of the community who believe in the claims of these people. Suppose a woman who did believe were told that her husband or son was going to die soon, one can imagine the effect it would have on her. The first case in which it was held that it is necessary to show an intent to deceive is *Davis v. Curry* (2), and I think that in so holding the Court went beyond what was necessary in order to satisfy the Act. It seems to me that the words in s. 4 of the Vagrancy Act, 1824, "to deceive and impose on any of His Majesty's subjects" qualify the words "using any subtle craft, means or device, by palmistry or otherwise," and do not refer to or qualify the preceding words "pretending or professing to tell fortunes," because the latter is ipso facto a deceiving. I think, therefore, that the conviction should be upheld, and the appeal dismissed.

(1) [1899] 1 Q. B. 846, 850.

(2) [1918] 1 K. B. 109.

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DARLING J. In this case I have come to the conclusion, after a great deal of doubt and in consequence of the arguments, that the decision of the magistrate was right. This is in conflict with what I said in *Davis v. Curry* (1), though Mr. Artemus Jones for the respondent has satisfied me that it is in accordance with my judgment in *Reg. v. Entwistle*. (2) What has convinced me that I was wrong in *Davis v. Curry* (1) is the consideration of the older statutes, which were not brought to our notice in that case. The prosecution in this case is founded on the Vagrancy Act, 1824. The earliest statute one need notice is 39 Eliz. c. 4, passed in 1597, and that statute in s. 2 deals with the matter in these words: "All idle persons . . . fayning themselves to have knowledge in physiognomye palmestry or other like crafty scyence, or pretending that they can tell destenyces fortunes or such other like fantastickall imagynacions . . . shal be taken adjudged and deemed rogues vagabonds and sturdy beggers." There it is made an offence to pretend that one can tell "destenyces fortunes," and there is nothing in the section about intending to deceive. It is assumed that to tell fortunes is a nuisance, and it is boldly enacted that it shall be an offence to do so, even though without any intent to deceive. That was followed by an Act of James I. (2 Jac. 1, c. 7) repealed by 12 Anne 2, c. 23, and then came 17 Geo. 2, c. 5, passed in 1744, which by s. 2 says that "all persons pretending to be gypsies, or wandering in the habit or form of Egyptians, or pretending to have skill in physiognomy, palmestry, or like crafty science, or pretending to tell fortunes, or using any subtil craft to deceive and impose on any of His Majesty's subjects" shall be deemed rogues and vagabonds. I read that as describing three offences: first, that of pretending to be gypsies; or, secondly, pretending to have skill in physiognomy, etc., and thirdly, pretending to tell fortunes, or using any subtle craft to deceive and impose on people. I think that the words "to deceive and impose on any of His Majesty's subjects" do qualify the words "to tell fortunes" in this way, that to tell fortunes is to impose on some one. Then comes the Act of 1822

(1) [1918] 1 K. B. 109.

(2) [1899] 1 Q. B. 846.

(3 Geo. 4, c. 40), s. 3 of which says that "all persons pretending to be gypsies; all persons pretending to tell fortunes, or using any subtle craft, means or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects" are to be deemed rogues and vagabonds. The word "device" is there used for the first time. Over seventy years have gone by and the form is altered. Instead of "craft to deceive" the section says "craft, means or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects." I come to the conclusion that that means that professing palmistry or telling fortunes or using any subtle craft is a thing which in itself is done to deceive or impose on His Majesty's subjects because the Legislature had come to the conclusion that all such things were mischievous nonsense.

Then came the statute we are now dealing with, the Vagrancy Act, 1824. By s. 4 it is enacted that "every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects" is to be deemed a rogue and vagabond. I think it is a wrong reading of those words to read them as if "with intent to deceive" were added, and I think so because of the reading of the earlier statutes. They mean that the device of palmistry or fortune telling is a deceptive device, and that instead of speaking of the deceptive device of fortune telling the section speaks of professing to tell fortunes to deceive and impose on, etc. On reading the earlier statutes I have come to the conclusion that the Legislature had decided for itself that fortune telling was a fraud, and that professing to tell fortunes was professing to say what was false. It was satisfied that people were deceived by it, and that therefore it was a deceptive device in itself, and that it did not matter whether the person telling fortunes believed he could do so or not, and consequently forbade its practice. For these reasons I have come to the conclusion that I was wrong in *Davis v. Curry* (1) and that *Reg. v. Entwistle* (2) was rightly decided.

(1) [1918] 1 K. B. 109.

(2) [1899] 1 Q. B. 846.

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AVORY J. In view of the conclusion at which the Court has arrived it is unnecessary for me to repeat what I said in *Davis v. Curry* (1), but I think it useful to recall the judgment of the magistrate in that case. He (2) "was of opinion that the question of bona fides, in the sense that the appellant herself believed or had persuaded herself that she possessed what she called 'supranormal' power, was quite irrelevant to the issue, because the act of pretending or professing to tell fortunes, especially when done for gain, is prohibited entirely by the statute, which imports that deception is practised thereby irrespectively of the actual frame of mind of the person so pretending or professing or any special evidence of dishonesty." That, in my opinion, expresses the true construction of the Act, and I only wish to add that according to the view which I take of the cases cited to us to-day, there were at least five judges who had expressed the same view prior to the decision in *Davis v. Curry*. (1) In *Monck v. Hilton* (3) both Cleasby and Pollock BB. took the view that pretending to tell fortunes was in itself an offence. And in my view Darling and Channell JJ. really took the same view in *Reg. v. Entwistle*. (4). Channell J. said (5) that the words "to deceive and impose on" did not apply to "pretending or professing to tell fortunes," but that the intent to deceive was involved in the words "pretending or professing," and, looking at the earlier legislation on the subject, I come to the same conclusion. If the words "to deceive and impose on" do apply to the preceding words "pretending or professing to tell fortunes," then *Reg. v. Entwistle* (4) could not have been decided as it was, for it decided that it is unnecessary to allege the intent. The result is that it was not necessary for the magistrate in this case to inquire whether or not the appellants believed in this kind of "fantastic imagination." The appeal must be dismissed.

SHEARMAN J. I am of the same opinion. This Court has

(1) [1918] 1 K. B. 109.

(2) *Ibid.* 109, 115.

(3) 2 Ex. D. 268.

(4) [1899] 1 Q. B. 846.

(5) *Ibid.* 851.

been called together because there has been a conflict of decisions in the reported cases. I do not think therefore that it would serve any useful purpose to discuss those cases. As soon as one looks into the history of this matter which has been dealt with at length by my brother Darling, I think it is quite clear. From earliest times certain persons were treated as rogues and vagabonds who practised certain devices which were considered to be bad for the public generally. One of these was the telling of fortunes. There is a number of old statutes, the last of which was 17 Geo. 5, c. 5, which placed among rogues and vagabonds people who did certain things with an intention to deceive, and to these things were added some which were prohibited as bad in themselves with whatever intention they were done. The Act of 1824 took the words we have to interpret almost bodily from the older Act, through the Act of 1822 (3 Geo. 4, c. 40) on its expiration, adding the word "professing." It seems to follow that the words were intended to have the same meaning as they had formerly borne, and that in the earlier Act "craft to deceive," and in the later Act "craft, means or device . . . to deceive," mean a deceptive craft, means or device. To my mind the words "to deceive and impose on" do not mean "with intent to deceive and impose on," and do not qualify the words "pretending or professing to tell fortunes." The true meaning of the section is that it makes the pretending or professing to tell fortunes an offence in itself. This brings us back to the ordinary problem one has to deal with in every criminal case. Before there can be a conviction in a criminal case it is necessary to show mens rea. One has to see in each case whether one is dealing with an act prohibited per se or an act only criminal when done feloniously or fraudulently with an intent to deceive. In this particular offence the mens rea consists in the intention to do the act prohibited by the statute, which is to pretend or profess to tell fortunes, and as soon as that act is proved it is immaterial whether the person pretending or professing did in fact believe that she could do what she professed to do or not. In my judgment the finding of the magistrate was right.

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GREER J. I agree, and have very few words to add. It has been argued that the respondent's interpretation of the relevant section would have the result that any patentee, or any person who had discovered a useful device for any purpose would be brought within the section. This is not so. It was necessary to qualify the words "craft, means or device," and in order to do so the words were added that the craft, means or device is to be craft, means or device "by palmistry or otherwise, to deceive and impose on." There is no reason whatever why the preceding words "pretending or professing to tell fortunes" should be qualified by any such limitation, because without it they are both intelligible and reasonable, that is to say, there are good reasons why Parliament should make fortune telling an offence even in the case of persons who believe that they are truly telling these fortunes. I think that the words "to deceive and impose on" do not qualify the words "pretending or professing to tell fortunes," and that the offence is complete without any finding of an intent to deceive.

Appeal dismissed.

Solicitors for appellant : *Tiddeman & Enthoven.*

Solicitors for respondent : *Wontner & Sons.*

W. L. L. B.

In re FRANK HILL.

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May 2.

Ex parte HOLT AND COMPANY.

Bankruptcy—Bankruptcy Notice—Party entitled to issue—Judgment recovered by Firm in Firm Name—Retirement of Partner—"Change . . . in the parties" entitled to Execution—Right to issue Bankruptcy Notice in Firm Name—Leave of the Court—Rules of the Supreme Court, Order XLII., r. 23—Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 38.

Where a firm consisting of several members has recovered in the firm name judgment against a debtor, the fact that a member has since retired from the firm does not render it necessary that the firm should obtain the leave of the Court under Order XLII., r. 23, of the Rules of the Supreme Court, in order that a bankruptcy notice may be issued in the name of the firm, and a bankruptcy petition presented in that name.

APPEAL from Brentford County Court.

On November 15, 1919, the firm of Holt & Co., carrying on business in that name as bankers and army and navy agents, recovered, in an action in the King's Bench Division against Frank Hill (hereinafter called "the debtor"), judgment for 95*l.* 7*s.* 8*d.* debt, 5*l.* costs, and 4*l.* 3*s.* 6*d.* interest, amounting in all to 104*l.* 11*s.* 2*d.*, of which 7*l.* 10*s.* was afterwards paid on account, leaving a balance due of 97*l.* 1*s.* 2*d.* At the date of the judgment the firm of Holt & Co. consisted of four partners, who were the persons then trading under the firm name, and who under the Registration of Business Names Act, 1916 (6 & 7 Geo. 5, c. 58), were registered as the persons constituting the firm during 1919.

On March 31, 1920, H. F. Guinness, one of the four partners in Holt & Co., retired from the firm, the partnership between him and the other partners being, so far as he was concerned, dissolved as from that date, and formal notice to that effect was published in the London Gazette of April 16, 1920.

A bankruptcy notice dated January 1, 1921, issued at the request of "Holt & Co.," and directed to the debtor requiring him to pay to "Holt & Co." the balance of the judgment debt, was on January 3, 1921, served upon the debtor.

A petition, dated February 9, 1921, and signed "Holt & Co., by V. G. M. Holt, a partner in the said firm," was on

1921 February 16, 1921, presented by that firm to the county court
 FRANK HILL, that a receiving order might be made in respect of the estate
In re. of the debtor on the ground that the debtor within three
 HOLT & Co., months before the date of presentation of the petition had
Ex parte. committed an act of bankruptcy in that he had failed to comply
 with the requirements of the above-mentioned bankruptcy
 notice. The debtor gave notice, dated April 1, 1921, of his
 intention to oppose the petition on the grounds that the
 petitioners did not obtain final judgment against the debtor ;
 that the bankruptcy notice referred to in the petition was
 incorrect in alleging that a final judgment was obtained by the
 petitioners against the debtor and was therefore invalid and of
 no effect ; and that the debtor had not committed the act of
 bankruptcy alleged in the petition.

On April 6, 1921, the petition was heard by the registrar
 of the county court, and a receiving order was made against
 the debtor.

The debtor gave notice of appeal that the receiving order
 might be set aside and the petition dismissed on the grounds :
 that the petitioners did not on November 15, 1919, obtain
 final judgment against the debtor ; that since the date of the
 judgment Guinness had retired from the firm and that the firm
 was thereby dissolved ; that that retirement and/or dissolution
 constituted a change of parties within Order XLII., r. 23 (1) ;
 that under that rule when any change has taken place by death
 or otherwise in the parties entitled to execution, it is obligatory
 on the party alleging himself to be entitled to execution to
 apply to the Court for leave to issue execution ; that the
 petitioners had failed to apply for and obtain that leave ;
 that the petition and the bankruptcy notice were in the

(1) Rules of the Supreme Court,
 Order XLII., r. 23 : " In the following
 cases, viz. : (a) Where six years have
 elapsed since the judgment or date
 of the order, or any change has taken
 place by death or otherwise in the
 parties entitled or liable to execu-
 tion ; the party alleging
 himself to be entitled to execution
 may apply to the Court or a judge for

leave to issue execution accordingly.
 And such Court or judge may, if
 satisfied that the party so applying
 is entitled to issue execution, make
 an order to that effect, or may order
 that any issue or question necessary
 to determine the rights of the parties
 shall be tried in any of the ways in
 which any question in an action may
 be tried. . . . "

premises invalid and of no effect ; that the registrar was wrong in deciding that the retirement and/or dissolution did not constitute a change of parties within that rule, and in deciding that it was unnecessary for the petitioners to apply for and obtain leave under the rule ; and that s. 38 of the Partnership Act, 1890, was not applicable to the present case.

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Ex parte.

R. W. S. Mendl for the appellant. The receiving order was improperly made and should be set aside. At the time when the firm of Holt & Co. recovered judgment against the debtor that firm consisted of four partners. One of these partners afterwards retired from the firm and the partnership, so far as he was concerned, was dissolved. There was thus a "change in the parties entitled to execution" within the meaning of Order XLII., r. 23 (a), of the Rules of the Supreme Court, and Holt & Co. could not issue execution against the debtor unless they first applied to the Court under that rule for leave to do so, and obtained leave: *Ex parte Woodall* (1); and see *Brickland v. Newsome*. (2) They proceeded, however, without the leave of the Court to obtain and serve upon the debtor a bankruptcy notice, to present a petition, and to procure the making of a receiving order against the debtor. All these proceedings were accordingly irregular, and the receiving order should be set aside and the petition dismissed: *Ex parte Woodall*. (1) The name of a firm is only a conventional mode of designating the persons composing it, and any variation amongst these persons is productive of a new signification of the name: Lindley on Partnership, 8th ed., Bk. I., ch. 7, s. 2, p. 138; Bk. II., ch. 3, s. 1, p. 319; and on the dissolution of the firm by the retirement of a partner or otherwise the agency of the partners is determined for most purposes: *Ib.*, Bk. II., ch. 2, s. 3, p. 261. The proceedings of the petitioning creditors in this case were not justified by s. 38 of the Partnership Act, 1890, which provides that after the dissolution of a partnership the authority of each partner to bind the firm, and the other rights of the partners continue so far as necessary to wind up the partnership

(1) (1884) 13 Q. B. D. 479.

(2) (1808) 1 Camp. 474.

1921 and to complete transactions begun but unfinished at the
FRANK HILL, time of the dissolution, "but not otherwise."
In re. [In re *Wenham* (1) was also referred to.]
HOLT & Co.,
Ex parte. W. N. *Stable* for the respondents was not called upon
to argue.

HORRIDGE J. This is an appeal from a receiving order made in the Brentford County Court against the appellant on the petition of the firm of Holt & Co. On November 15, 1919, that firm recovered judgment against the appellant. When that judgment was obtained there were four partners in the firm. On March 31, 1920, one of the partners, H. F. Guinness, retired from the firm. On January 1, 1921, a bankruptcy notice following the form of the judgment issued against the appellant which purported to be issued in the name of Holt & Co. On February 16, 1921, a bankruptcy petition by Holt & Co. was presented and filed, and thereupon the receiving order was made. It is now said that because Guinness had retired from the firm there had been a "change in the parties entitled to execution" within the meaning of Order XLII., r. 23, and that leave should have been obtained under that rule, in order to enable a bankruptcy notice to be issued by the three remaining partners of the firm. In my opinion there was not a change of parties within the meaning of the rule, and it was not necessary to obtain the leave of the Court under the rule. At the time when the judgment was recovered by Holt & Co. the persons who were entitled to enforce it were the four persons who were at that time the members of the firm. On the retirement of Guinness the persons entitled to enforce the judgment were still the members of the firm of Holt & Co. By virtue of s. 38 of the Partnership Act, 1890, there was for this purpose no change in the firm. That section provides: "After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to

complete transactions begun but unfinished at the time of the dissolution." Here it is clear that the proceedings were perfectly regular. The judgment was obtained in the name of Holt & Co. The bankruptcy notice was in the name of that firm, and the petition was presented in the name of that firm. The firm of Holt & Co. originally consisted of four members and the surviving or continuing partners of the firm were quite at liberty to issue the bankruptcy notice and to present that petition. I shall not assume that they had not authority to do so.

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Horridge J.

SALTER J. I agree.

Appeal dismissed.

Solicitors for appellant: *Fowler, Legg & Young.*

Solicitors for respondents: *Dowsons & Sankey.*

J. R.

[IN THE KING'S BENCH DIVISION AND IN THE
COURT OF APPEAL.]

In re WIGZELL.

Ex parte HART.

K. B. D.

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Jan. 17;
Feb. 7.

C. A.

March 11, 14,
15.

Bankruptcy—Receiving Order—Stay of Advertisement and all Proceedings thereunder pending Appeal—Subsequent Payments into Bank by Bankrupt—Payments out to Bankrupt by Bank—Ignorance of Bank—Right of Trustee in Bankruptcy to claim Money from Bank—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), ss. 11, 18, 37, 38, 45, 46, 74—Bankruptcy Rules, 1915, r. 186.

A receiving order was made against a debtor who thereupon applied for and obtained a stay of the advertisement of the receiving order and all proceedings thereunder pending an appeal therefrom. The appeal was subsequently dismissed and an order was made adjudicating him bankrupt. At the date of the receiving order the bankrupt had an account at a bank. After the making of the receiving order and pending the hearing of the appeal the bankrupt paid into the bank sums amounting to 165*l.* which he had collected from his debtors, and drew out of his account sums amounting to 199*l.* The bank acted in good faith and received and paid those sums in the ordinary course of business without knowing that a receiving order had been made against the bankrupt.

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HART,

Ex parte.

The trustee in bankruptcy claimed a declaration that the sums paid into the bank after the date of the receiving order vested in him as trustee :—

Held, by the Divisional Court and the Court of Appeal, that the sums paid into the bank by the bankrupt after the date of the receiving order became by virtue of s. 18, sub-s. 1, s. 37, sub-s. 1, and s. 38 (a), of the Bankruptcy Act, 1914, the property of his trustee in bankruptcy, and that the bank were not entitled to credit themselves with the payments out to the bankrupt, as those transactions took place after the date of the receiving order and were therefore not protected by ss. 45 and 46; that there was nothing dishonest in the trustee enforcing the rights given to him by the Act, and that the action of the Court in staying the advertisement and proceedings could not operate in any way in derogation of the rights of the trustee.

In re Thellusson [1919] 2 K. B. 735 considered and distinguished.

Ex parte James (1874) L. R. 9 Ch. 609; *Ex parte Rabbidge* (1878) 8 Ch. D. 367; *In re Hall* [1907] 1 K. B. 875; *In re Tyler* [1907] 1 K. B. 865; *In re Stokes* [1919] 2 K. B. 256 discussed.

APPEAL from a decision of the judge of the Edmonton County Court upon a motion by the trustee in bankruptcy of G. R. Wigzell against Barclays Bank, Ltd., claiming a declaration that the monies standing to the credit of the bankrupt at the bank and monies paid into the bankrupt's account at the bank drawn out or upon by the bankrupt between October 8 and November 10, 1919, formed part of the property of the bankrupt divisible among his creditors, and vested in the trustee of the bankrupt.

A receiving order was made against the bankrupt in the Edmonton County Court on October 8, 1919. After the receiving order was made the bankrupt applied for a stay of the advertisement of the receiving order and all proceedings thereunder pending an appeal to the High Court against the making of the receiving order. This application was granted, and in consequence thereof the receiving order was not advertised pending the hearing of the appeal. The appeal was heard on November 10, 1919, and was dismissed with costs. The order of adjudication was made on November 20, 1919.

At the date of the receiving order the bankrupt had an account at the Stoke Newington branch of Barclays Bank, Ltd., which account was then overdrawn to the amount of 26*l.* 7*s.* 2*d.* After the making of the receiving order and pending the

hearing of the appeal therefrom, the bankrupt paid into his account at that branch sums which he had collected or otherwise obtained from his debtors, and which were due to his estate, amounting to 165*l.* 2*s.* 3*d.*, and he drew upon the bank for various sums. The payments out of the account amounted to 199*l.* 19*s.* 7*d.* The payments in began on October 8 and ended on November 5, 1919.

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HART,
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The bank acted in good faith and received and paid out the various sums above mentioned in the ordinary course of business without knowing that a receiving order had been made against the bankrupt, and it was contended that they were deprived of the means of knowledge by the action of the Court in staying the advertisement and proceedings.

The trustee claimed that as the sum of 165*l.* 2*s.* 3*d.* was paid in after the date of the receiving order it vested in him as trustee, and that the bank were not entitled to credit themselves with anything paid out to the bankrupt.

The county court judge held that the trustee's contention was well founded, and that he was entitled to the declaration claimed.

Barclays Bank, Ltd., appealed.

Sir Harold Smith for Barclays Bank, Ltd. The Court by suspending the advertisement of the receiving order deprived the bank of all means of knowing that a receiving order had been made, and as the bank acted in good faith and in the ordinary course of business it is not equitable that they should suffer a loss attributable to the fact that the Court by making the order staying the advertisement prevented the bank from obtaining knowledge that a receiving order had been made. By s. 11 of the Bankruptcy Act, 1914, notice of every receiving order, stating the name, address, and description of the debtor, the date of the order, etc., has to be gazetted and advertised in a local paper in the prescribed manner. Sect. 74, sub-s. 1, imposes a duty on the Official Receiver to advertise the receiving order. Under r. 186 of the Bankruptcy Rules, 1915, where a receiving order is made in a county court the registrar must forthwith give

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notice thereof to the Board of Trade, and the Official Receiver must forthwith send notice thereof to such local paper as the Board of Trade may direct, or in default of such direction, as he may select. The principle which ought to be followed in this case was laid down in *Ex parte James* (1) and in *Ex parte Simmonds*. (2) Lord Esher said in the last case that "although the Court will not prevent a litigant party from acting in this way [namely, to keep money paid under a mistake of law] it will not act so itself, and it will not allow its own officer to act so. It will direct its officer to do that which any high-minded man would do, viz., not to take advantage of the mistake of law. . . . A trustee in bankruptcy has always been treated as an officer of the Court of Bankruptcy, and the Court will order him to act in an honourable and high-minded way." That principle was followed in *In re Tyler* (3), where Buckley L.J. said : "In *Ex parte James* (4) James L.J. speaks of money which in equity belongs to some one else. In my judgment he there meant money which in point of moral justice and honest dealing belongs to some one else. He was using the words in a popular sense, and not in the sense of money which in a Court of Equity would belong to some one else. I think the context of his judgment plainly shews that that was his meaning. In *Ex parte Simmonds* (5) Lord Esher referring to *Ex parte James* (1), says that the Court will direct its officer to act as any high-minded man would act—namely, not to take advantage of a mistake of law. That is to say, assuming that he has a right enforceable in a Court of justice, the Court of Bankruptcy or the Court for the administration of estates in Chancery will not take advantage of that right if to do so would be inconsistent with natural justice and that which an honest man would do." Those cases were considered and applied in *In re Thellusson*. (6) There money was lent by the applicant to, and received by the debtor, in ignorance of the fact that a receiving order had been made against the debtor, and it was held by the

(1) L. R. 9 Ch. 609.

(2) (1885) 16 Q. B. D. 308, 312.

(3) [1907] 1 K. B. 865, 873.

(4) L. R. 9 Ch. 614.

(5) 16 Q. B. D. 308.

(6) [1919] 2 K. B. 735.

Court of Appeal that the Court of Bankruptcy ought not to allow its officer to insist upon a rule of law or equity in the administration of an estate in bankruptcy under the control of the Court where insistence would produce an unjust and dishonest result, and that as it would have been dishonourable for the debtor to receive the money if he had known of the receiving order the trustee ought to refund it.

[HORRIDGE J. There must always be some delay between the making of the receiving order and the advertisement of the order. Is it unjust for the trustee to claim money paid after the making of the order but before the advertisement appears in the paper, or is it only unjust for the trustee to claim money in cases where the advertisement is delayed? By ss. 45 and 46 of the Bankruptcy Act, 1914, protection is only given to those transactions by or with the bankrupt which take place before the date of the receiving order, and by ss. 18, 37 and 38 the title of the trustee relates back to the date of the receiving order.]

The trustee is estopped from claiming the money in either case. The trustee must act honestly and he must not take advantage of the debtor's dishonesty to the detriment of a third party who has acted innocently. The Court of Appeal in *Theellusson's Case* (1) disregarded the Act of Parliament, because it was fair and honest that the trustee should not insist upon the rights which the Act gave him. In *In re Teale* (2) the Court ordered a receiving order to be antedated to the date on which it ought to have been made if a bankruptcy petition had not been wrongly dismissed, but the Court expressed the opinion that third parties who had had dealings with the bankrupt in the interval should not be affected by the antedating of the order. The Court decided in *In re Bell* (3) that it would be inequitable to allow a trustee in bankruptcy to take property which the bankrupt honestly considered he held as trustee. The bank in the present case were under an obligation to honour the cheques of the bankrupt so long as they had no knowledge that a receiving order

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(1) [1919] 2 K. B. 735.

(2) [1912] 2 K. B. 367.

(3) (1908) 99 L. T. 939.

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had been made, and in the absence of such knowledge or that their customer contemplated a breach of trust the bank are not liable to make good the trust money: see *Coleman v. Bucks and Oxon Union Bank*. (1)

G. F. Kingham and *H. Geen* for the trustee in bankruptcy. The money that was in the bankrupt's account at the Stoke Newington branch of Barclays Bank when the receiving order was made and the money that was subsequently paid into that account by the bankrupt vested in his trustee in bankruptcy. By s. 18, sub-s. 1, of the Bankruptcy Act, 1914, upon the adjudication of a debtor as bankrupt, the property of the bankrupt thereupon becomes divisible among his creditors and vests in the trustee. By s. 37, sub-s. 1, the bankruptcy of a debtor is deemed to relate back to, and to commence at the time of the act of bankruptcy being committed on which the receiving order was made. By s. 38 (a) all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by him or devolve on him before his discharge, is divisible among his creditors. "The trustees' title accrues not by any order declaring the transaction an act of bankruptcy but by the operation of the statute as soon as the receiving order is made": per Lord Sterndale M.R. in *In re Gunsbourg*. (2) The decision in *In re Thellusson* (3) is distinguishable. It was there held that as the trustee is an officer of the Court, the Court will compel him to do what is honourable, and although he may have a right in law or equity to retain money in the hands of the bankrupt he will not be allowed to do so if the circumstances are such that upon learning them an honest man would have at once returned the money. In that case the money would not have been paid to the bankrupt if it had been known that a receiving order had been made, and moreover it did not form any part of the bankrupt's estate, and it would therefore have been dishonest of the trustee to have kept it. In the present case, however, the money which was paid into the bank was money which formed part

(1) [1897] 2 Ch. 243.

(2) [1920] 2 K. B. 426, 437.

(3) [1919] 2 K. B. 735.

of the bankrupt's estate, as it was money owed to him by his debtors, and therefore as from the adjudication was money which vested in his trustee. The bankrupt therefore paid into his banking account, and drew out from that account the trustee's money. There is nothing dishonest in the trustee in the present case claiming money which the Act says is vested in him, and moreover he is bound to take steps to protect the interests of the creditors. The only objection that the bank can urge to the declaration is the fact that the receiving order was not advertised in the usual way, but the trustee was no party to the stay of advertisement being granted. The granting of the stay did not cause any hardship, as the bank could, by inspecting the book in which the receiving order was entered, have discovered that the order had been made, notwithstanding the fact that it had not been advertised. The bank ought to have searched or caused searches to be made. There have been many cases in which debtors have paid money which they owed to a bankrupt after the date of the receiving order but before the receiving order had been advertised, and they have had to pay the money over again to the trustee. Phillimore J. in *In re Teale* (1) expressed the opinion, without deciding the point, that transactions between receiving order and adjudication were not protected, and he pointed out that that interval of time is often considerable. The Court of Appeal in *In re Carr* (2) stayed all advertisements for two months, but the Court pointed out that they were not staying the hand of the Official Receiver, and that he would be able to protect the property.

Sir Harold Smith replied.

Cur. adv. vult.

Feb. 7. HORRIDGE J. read a judgment in which he stated the facts set out above, and continued as follows: The appellants appeal to this Court against the order making them responsible for the sum of 165*l.* 2*s.* 3*d.* It was contended before us on behalf of [the appellants that inasmuch

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(1) [1912] 2 K. B. 371.

(2) (1886) 3 Times L. R. 120.

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*In re.*HART,
Ex parte.

Horridge J.

as they admittedly paid the sum of 199*l.* 19*s.* 7*d.* bona fide and without knowledge of the receiving order, the advertisement of which had been stayed by the Court, the trustee could not as an honest man ask for payment of the 165*l.* 2*s.* 3*d.* In support of this contention the case of *In re Thellusson* (1) was relied on.

It seems clear that the effect of s. 18, sub-s. 1, s. 37, sub-s. 1, and s. 38 (a), of the Bankruptcy Act, 1914, is to make the 165*l.* 2*s.* 3*d.* the property of the trustee in bankruptcy, and these transactions were not protected by ss. 45 or 46, which both apply to transactions before the receiving order.

The question remains whether or not the trustee in the circumstances of this case ought as an honest man to enforce his rights against the bank.

Under s. 11 of the Bankruptcy Act notice of every receiving order is to be gazetted and advertised in a local paper in the prescribed manner. By s. 74, sub-s. 1, it is the duty of the Official Receiver to advertise the receiving order, and by r. 186 the Registrar is forthwith to give notice to the Board of Trade of the making of a receiving order, and the Official Receiver has forthwith to send notice thereof to such local paper as the Board of Trade may from time to time direct, or in default of such direction, as he may select.

In this case the Court stayed the insertion of the advertisement until after the hearing of the appeal to the Divisional Court, and it was contended before us that, having regard to this action on the part of the Court, it would not be proper to allow the trustee to enforce his rights against persons who had acted bona fide and who had not an opportunity of seeing the advertisement of the receiving order.

I have very carefully read the judgments of the Court of Appeal in *In re Thellusson*. (1) The facts of that case were that the bankrupt who knew that a petition had been presented against him which was coming on for hearing obtained from the applicant a sum of 900*l.* of which the balance of 764*l.* 0*s.* 5*d.* was the subject matter of decision. Neither the bankrupt nor the applicant had any knowledge at the time

(1) [1919] 2 K. B. 735.

of the payment that a receiving order had in fact been made. Warrington L.J. says (1): "I think under such circumstances an honest man would on ascertaining the facts at once repay the money." Duke L.J. says (2): "The principle to be applied is that the Court in Bankruptcy ought not to allow its officer to insist upon a rule of law or equity in the administration of an estate in bankruptcy under the control of the Court where such insistence would produce an unjust and dishonest result." Atkin L.J. says (3): "If it would be dishonourable of the debtor to use the money to pay his creditors, it is equally dishonourable for the officer of the Court, knowing the full facts, to use the money to pay his creditors."

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I have not dealt with the earlier authorities, as they are fully discussed in the judgment of the Court of Appeal, but I think the case of *In re Thellusson* (4) clearly enunciated the principle and afforded the most extended example of the principle it affirmed. Atkin L.J. says (5): "It only remains to add that the principle of *Ex parte James* (6) has not been applied before in quite similar circumstances. Here we are directing the return of money paid in execution of the consideration moving from the promisee in a contract of loan; and we are doing so in the absence of the debtor, the other party to the contract. It is an extended application of the principle, but the principle is the same."

On behalf of the applicant it was contended that the facts of this case brought it distinctly within the principle of *In re Thellusson*. (4) It was said that in each case the payment was made after receiving order and in ignorance of the fact that the receiving order had been made.

The question we have to decide is a very difficult one, but I cannot think that the judgment of the Court of Appeal in *In re Thellusson* (4) was intended to lay down the general principle that the trustee ought never to enforce his rights in respect of payments made after a receiving order in ignorance

(1) [1919] 2 K. B. 751.

(2) *Ibid.* 756.(3) *Ibid.* 764.

(4) [1919] 2 K. B. 735.

(5) *Ibid.* 765.

(6) L. R. 9 Ch. 609.

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of the receiving order being made. I think what the judgment did decide was that on the facts of that particular case it would not be right for the trustee to enforce his claim. In this case the stay of the advertisement was not the act of the trustee but the act of the Court, but having regard to the decision in *In re Thellusson* (1) I do not think that this fact would make any difference if the result of the stay was to make it inequitable for the trustee to enforce his right. Atkin L.J. in *In re Thellusson* says (2): "It can make no difference whether the trustee himself has acquired the property by unworthy means, or whether there is vested in him by operation of law property which has been acquired by the debtor by unworthy means." Transactions which are to be protected are expressly provided for by ss. 45 and 46 of the Bankruptcy Act, 1914, and these sections expressly provide that in order to obtain protection the transactions must be before the receiving order. If we were to hold in this case that the trustee could not recover I think it would be in effect altering those sections to give protection in all cases where the party claiming protection had no notice of a receiving order, although one had in fact been made. Apart from the stay of advertisement in this case, which was the act of the Court, there would necessarily have been an interval of time between the making of the receiving order and the actual appearance of the advertisement, and I cannot think that the trustee could be prevented from claiming in respect of transactions between these two dates because the receiving order had not been made known to the person from whom the claim was made, and I do not think the action of the Court in staying the advertisement can act in any way in derogation of the rights of the trustee.

I think the true view of the decision of the Court of Appeal is that the Court ought to ascertain in each case whether or not it is honest and right for the trustee to make his claim, and in my judgment it was honest and right for the trustee to enforce the rights given to him in the Act of Parliament, and which Parliament might have

(1) [1919] 2 K. B. 735.

(2) [1919] 2 K. B. 764.

made to depend on the fact of notice or no notice if they had desired to do so.

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 WIGZELL,
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Horridge J.

In this case the monies paid in were clearly the property of the trustee, and I do not think the payments out can in any way be relied upon in favour of the bank. I have endeavoured to interpret and give full effect to the decision in *In re Thellusson* (1) which, as I understand it, is that the Court will not allow its officer to do what is not honest, but in this case I can see no dishonesty in the trustee enforcing his claim.

SALTER J. read the following judgment. I am of the same opinion. The legal right is clear. The money claimed by the trustee is vested in him and divisible among the creditors by the express terms of the Act. The Court of Appeal, however, have repeatedly decided that where a bankrupt's estate is being administered by the trustee under the supervision of a Court, that Court has a discretionary jurisdiction to disregard legal right, and that such jurisdiction should be exercised wherever the enforcement of legal right would, in the opinion of the Court, be contrary to natural justice. In reliance on these decisions the learned county court judge was invited, in the exercise of his discretion, to disallow the trustee's claim. He declined to do so. This discretion is clearly subject to review, and we are asked, in the exercise of our discretion, to reverse it. The question to be decided is, therefore, one of ethics, not of law.

Legal rights can be determined with precision by authority, but questions of ethical propriety have always been, and will always be, the subject of honest difference among honest men. The effect of exercising the jurisdiction which these decisions have asserted and defined is to deprive the creditors of money which is divisible among them by law. I feel sure that such a power should not be used unless the result of enforcing the law is such that, in the opinion of the Court, it would be pronounced to be obviously unjust by all right-minded men. I do not think this can be asserted, with any confidence, in the

(1) [1919] 2 K. B. 735.

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present case. There is, in my opinion, a material difference between the facts we have to consider and those in *In re Thellusson* (1), and in the cases which that decision followed and extended. In those cases the assets had been increased in *Ex parte James* (2), *Ex parte Simmonds* (3) and in *In re Rhoades* (4), by payments made under mistake of law; in *In re Tyler* (5) by a life insurance maintained by the debtor's wife, and in *In re Thellusson* (1) by money obtained by the unfair conduct of the debtor. In the present case the assets have been diminished, and diminished by conduct of the debtor which was equally unfair to the appellants and to the creditors. Neither the appellants nor the trustee were parties to the order staying advertisement which enabled the debtor to withdraw this money from the bank. The question is which of two equally innocent parties, the appellants and the creditors, is to suffer by the debtor's improper conduct. The law places the loss on the appellants. I think that a creditor might say, without loss of honour, that he was not called on to waive his legal rights in order to shoulder a loss which he did nothing to cause and which the law places elsewhere. I could equally well understand a creditor deciding to forego the money rather than force the bank to make it good. I think an honest man might take either view. The bank suffers hardship, no doubt, but the result is not, in my opinion, so plainly immoral as to justify a Court of law in disregarding legal right. I think, therefore, that the discretion was rightly exercised, and that this appeal should be dismissed.

R. F. S.

Barclays Bank, Ltd. appealed. The appeal was heard on March 11, 14, 15, 1921.

Douglas Hogg K.C. and *Sir Harold Smith* for the appellants. We ask the Court to treat the receiving order as having been made at the date of the appeal. By the suspension of the

(1) [1919] 2 K. B. 735.

(3) 16 Q. B. D. 308.

(2) L. R. 9 Ch. 609.

(4) [1899] 2 Q. B. 347.

(5) [1907] 1 K. B. 865.

advertisement of the receiving order the appellants were deprived of the knowledge that the receiving order had been made. By the scheme of the Bankruptcy Act where once an act of bankruptcy has been committed by the debtor, if he subsequently becomes bankrupt all his property, from the date of the act of bankruptcy, vests in the trustee; but it is not fair that persons who have bona fide dealt with the debtor as a solvent person, without knowing that he was in peril of bankruptcy, should suffer; so bona fide dealings with the debtor are protected up to the date of the receiving order, because immediately it is made notice of it is given to the world by advertisement. When the advertisement is stayed by the Court, as it will be in a proper case, then the date of the receiving order ought to be advanced to the time when the stay is taken off and the receiving order is made effective. Where there is a refusal to make a receiving order and on appeal it is subsequently made it is dated back to the date when it should have been made. But if there are dealings by third parties with the debtor between the hearing before the Registrar and the appeal the Court will protect them by treating the date of the appeal as the date of the receiving order: *In re Teale* (1); *In re Raatz*. (2)

The principle is laid down in *Ex parte James* (3)—namely, that the Court will not allow its officer, the trustee, to act in a manner that is dishonourable by claiming money which in equity belongs to someone else: *Ex parte Simmonds* (4); *In re Rhoades* (5); *In re Tyler* (6); *In re Hall* (7); *In re Thellusson*. (8) In the latter case *In re Hall* (7) was relied upon as limiting the principle, but it was there distinguished, as also was *Tapster v. Ward*. (9)

It is submitted that the appellants on the principle established by the authorities are entitled to protection in this case.

[They also referred to *Cohen v. Mitchell*. (10)]

(1) [1912] 2 K. B. 367.

(2) (1897) 4 Manson, 50.

(3) L. R. 9 Ch. 609.

(4) 16 Q. B. D. 308.

(5) [1899] 2 Q. B. 347.

(6) [1907] 1 K. B. 865.

(7) [1907] 1 K. B. 875.

(8) [1919] 2 K. B. 735.

(9) (1909) 101 L. T. 503.

(10) (1890) 25 Q. B. D. 262.

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C. A. Clayton K.C. and Kingham for the trustee in bankruptcy.

1921 The Court is asked to repeal provisions which have run through all the Bankruptcy Acts. Those Acts have laid down as matter of administration certain defined rules, and to depart from them is in effect to legislate, which the Court will refuse to do.

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This case is covered by *Ex parte Rabbidge*. (1) It is true it was decided upon the Act of 1869, but in all material respects that is the same as the present Act.

[LORD STERNDALÉ M.R. referred to *Wells v. Wells* (2) where the authorities were discussed by Swinfen Eady L.J. in delivering the judgment of the Court in that case.]

The Bankruptcy Act, 1914, lays down what is the property of the bankrupt, and protects certain transactions, and enacts that others shall not be protected. The Court cannot, under this suggested jurisdiction to control the action of its officers, repeal those provisions.

There is no evidence that any part of the money drawn out of the bank by the bankrupt between the date of the receiving order and the date of the hearing of the appeal from it was applied by the bankrupt in payment of his creditors or of wages.

The Legislature, knowing of the hardships occasioned to creditors in certain cases has itself supported innocent transactions, subject to an express limitation that they should take place before the date of the receiving order or some equivalent date: see Bankruptcy Act, 1806 (46 Geo. 3, c. 135), s. 1; Bankruptcy Act, 1825 (6 Geo. 4, c. 16), ss. 81, 82; Judgments Act, 1839 (2 & 3 Vict. c. 11), s. 12; Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), s. 133; Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 94, s. 95, sub-s. 1; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 49; Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 45.

The standard of high-mindedness is laid down by the Act itself and ought not to be extended. *Ex parte James* (3) shows that the Court in applying the principle of high-mindedness

(1) 8 Ch. D. 367.

(2) [1914] P. 157.

(3) L. R. 9 Ch. 609.

must have regard to all the circumstances of the case. There the trustee had made an illegal demand and it was held that it was not decent that an officer of the Court should act in that way. *Ex parte Simmonds* (1) was to the same effect. In *In re Tyler* (2) there was what almost amounted to a fraud by silence within *Ramsden v. Dyson*. (3) In that case the official receiver knew that there was an existing policy of assurance on the life of the bankrupt and that his wife was paying the premiums. In those circumstances the Court held that having regard to that knowledge it ought not to allow its officer to retain the policy moneys without repaying the wife the sums she had paid for premiums and interest. *In re Hall* (4) was distinguished from *In re Tyler* (2) on that ground : see *Tapster v. Ward* (5) ; *In re Stokes*. (6)

C. A.

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In *In re Thellusson* (7) the facts are material. The object of the loan there was to satisfy a pressing creditor of the debtor. Neither the lender nor the debtor was aware at the time the loan was made that a receiving order had been made against the debtor.

[YOUNGER L.J. That was a case of extraordinary hardship. The lender would not even have been able to prove in the bankruptcy.]

The trustee was there seeking to use assets which under no moral process ought to form part of the bankrupt's estate. The money here in question is distributable among the creditors of the present bankruptcy : *In re Clark*. (8)

It is submitted that the present case is distinguishable from the previous cases in three respects :—

1. The statute having laid down what is the property of the bankrupt divisible amongst his creditors has itself taken into account what is the statutory indulgence to be allowed.

2. In all the previous cases the trustee was seeking to

(1) 16 Q. B. D. 308.

(2) [1907] 1 K. B. 865.

(3) (1866) L. R. 1 H. L. 129.

(4) [1907] 1 K. B. 875.

(5) 101 L. T. 25, 27.

(6) [1919] 2 K. B. 256.

(7) [1919] 2 K. B. 735, 757.

(8) [1894] 2 Q. B. 393, 403, 408.

C. A. increase the assets of the bankrupt by reason of transactions
 1921 which the Court thought morally unjust. Here the appellants
 are seeking to take away what the statute has said is the
 property of the bankrupt.

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3. In this case and in all the other cases except *In re Thellusson* (1) there was no act or omission on the part of the trustee which operated as a legal, moral or equitable estoppel.

Bankruptcy is a creature of statute and has no common law basis. Where therefore a statutory limit for protected transactions is imposed regard must be had to it in bankruptcy administration. Administration in bankruptcy could not proceed if the principles suggested by the appellants were to be extended.

The Court is bound to act upon decisions only so far as they lay down a principle of law.

The old plea of purchase for valuable consideration without notice established in *Bassett v. Nosworthy* (2) is no longer available: *Ind, Coope & Co. v. Emmerson*. (3)

[They also referred to *In re Manning*. (4)]

Douglas Hogg K.C. in reply.

LORD STERNDALÉ M.R. This is an appeal from a Divisional Court sitting in bankruptcy. It was opened before us as involving very important principles, and was argued by counsel for the bank with considerable elaboration, but at the end it came down to a question of what was to be done on the particular facts of the case. I quite agree that the first point is an important one—namely, whether the Court has power where the trustee has established a legal or equitable right to some property of the bankrupt to say: “No, you must not enforce that legal or equitable right because you are an officer of the Court; it would not be right to do it, and the Court will not act dishonourably.” But it was decided at least thirty or forty years ago that the Court had that power, and therefore it is, I think, quite unnecessary

(1) [1919] 2 K. B. 735.

(2) (1673) Rep. temp. Finch 102.

(3) (1887) 12 App. Cas. 300.

(4) (1885) 30 Ch. D. 480.

to go through the facts and arguments with regard to that point. It seems to me to have been established practically that there must be read into s. 45 of the Bankruptcy Act, 1914, after the second proviso, a third proviso: "Provided that the transaction whenever it takes place is one which it would not be honourable or high minded for a trustee to impeach." The Court will not allow a trustee in bankruptcy, who is its officer, to do, and certainly will not make an order that he shall do, something which in its opinion is dishonourable and not high-minded. I notice that Lord Esher in *Ex parte Simmonds* (1) says that the principle being a good, a righteous, and a wholesome one, he eagerly desires to adopt it. I have not thought it relevant to consider whether I adopt it with eagerness or not. When I find a principle laid down by a Court whose decision is binding upon me, I think the only thing I can do is humbly and faithfully to follow it to the best of my ability, and that is the only view that I take of that principle. It has been laid down, and I have to adopt and follow it. That principle undoubtedly does give rise, in my opinion, to a very considerable difficulty, because it is only necessary to resort to it after the trustee has proved a legal or equitable title to the property. If he fails to prove a legal or equitable title he cannot have an order in his favour. But when he has proved a legal or equitable title then this principle comes in, and the Court has to inquire whether or not it is honourable and high-minded in the Court to enable him to enforce that title. I entirely agree with what was said by Atkin L.J. in *In re Theellusson* (2) that "while one may agree that opinions as to rules of honesty differ, yet the difficulty of recognising honesty when she appears, affords no adequate reason for discarding her altogether." But that unexceptionable principle does not seem to give much help when one has to apply it to a particular case, since the last words of the learned Lord Justice must then be read in this way; "the difficulty of recognising honesty when, in my opinion, she appears, affords no adequate reason for discarding her altogether," because the question

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(1) 16 Q. B. D. 308, 312.

(2) [1919] 2 K. B. 735, 764.

C. A. whether the principle of honesty directing the conduct of
1921 the Court has appeared or not must depend upon the individual

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opinions of the judges who have at that moment to give the decision of the Court. I notice that Salter J. in his judgment, which seems to me to be one of extremely good sound sense and sound law, says this: "Legal rights can be determined with precision by authority, but questions of ethical propriety have always been, and will always be, the subject of honest difference among honest men." I do not know that I go quite so far as the learned judge in saying that legal rights can always be determined with precision by authority. There are no doubt rules to which you can resort, but in practice we have seen that absolute unanimity is not always obtained, even when you are dealing with legal or equitable rights. But when you once enter on the field in which there is no standard to be applied except that which each person thinks is the one of honesty and right the difficulty of course becomes enormously increased. To repeat Salter J.'s words: "Questions of ethical propriety have always been, and will always be, the subject of honest differences among honest men." There could not be more striking instances of that statement than the two cases of *In re Hall* (1) and *In re Thellusson* (2) which have been cited to us. In *In re Hall* (1) the judge in the Court below thought that the transaction was such an unfair one for the trustee to enforce that he would not enable him to do so. The Court of Appeal took a totally different view and said that it was a perfectly honourable transaction or claim for the trustee to enforce. On the other hand in *In re Thellusson* (2) the position was exactly reversed. In that case a learned judge of great experience in bankruptcy was of opinion that there was nothing unfair or dishonourable in the trustee enforcing his claim. The Court of Appeal on the other hand thought that there was and in strongly worded judgments reversed the learned judge's decision and said that it was a most unconscionable claim on the part of the trustee. Those are instances of the extraordinary differences of opinion that there must be when, as Salter J.

(1) [1907] 1 K. B. 875.

(2) [1919] 2 K. B. 735.

says, honest men are discussing ethical questions which must be the subject of honest differences amongst them.

Now there is, in my opinion, only one question of principle which arises in this case, and that is this. The argument for the appellants, I think practically in so many words, requires that it should be laid down as a general principle that wherever there is a stay of advertisement of a receiving order or of proceedings—and the stay of advertisement is really for the purposes of this case the important one—a transaction of the debtor's bank in receiving money from the debtor is protected, and the trustee cannot ask the bank to pay him that money as being the debtor's property. What took place here was this. A bankruptcy petition was filed against the debtor upon which the learned county court judge made a receiving order. Either at the same time or later in the same day—it does not seem to me to matter which—he made an order staying proceedings under the receiving order in order that the debtor might have an opportunity of benefiting by his appeal if he succeeded in getting the receiving order rescinded. Of course if the proceedings went on and the receiving order were advertised, the fruits of a successful appeal would be largely lost to the debtor, and therefore that order to stay was made by the county court judge. As a matter of fact the bank did not know that the receiving order had been made. The debtor paid 165*l.* into his account, and he drew out some 199*l.*, and the order as it stands is that the bank do pay to the trustee that sum of 165*l.*, and they are not allowed to credit against it any portion of those sums which were drawn out, and that latter fact arises from this that before the county court judge there was no evidence whatever as to the application of the moneys which the bank paid to the debtor. If any part of those sums went to the relief of the estate—I do not say it is the fact—the bank could not be compelled to pay the whole of the money paid in to the trustee, but the trustee could only claim that amount diminished by the extent to which the estate had benefited by the payments to the debtor. If such a point were to be raised it should have been raised in the county court,

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and raised upon evidence which showed the true facts. It was not raised, and we have nothing to do with it. It might be that such an order would be a right one. It might be that the county court judge might have said: "Applying the principle of fairness and honesty and honourable dealing, it seems to me that I ought only to give the trustee the amount which has been paid in as the debtor's property, subject to deduction of the amount to which the estate has benefited." It might have been so—I do not say whether it is so or not—but no such point was raised there, and no such point can possibly be raised here, because we have not the evidence before us of the facts upon which we could decide it. Really I do not think that a small point of that kind would have been the subject of an appeal by the bank to the Divisional Court and then to this Court. What they want to establish is that the proceedings under the receiving order having been stayed, and they not knowing of the receiving order, they are protected in their transactions with the debtor. I agree with the suggestion made by one of my learned colleagues that if that be so, the natural result must be that all transactions by any person with the debtor during the stay of proceedings under the receiving order must also be protected transactions. What we are in substance asked to do is to alter the first proviso of s. 45 of the Act, which now runs in this way: "that the payment . . . takes place before the date of the receiving order," so as to make it run: "that the payment . . . takes place before the date of the receiving order or within any period during which proceedings on the receiving order are stayed." That to my mind is legislation. I do not think it is possible for us to do it. The Legislature has fixed the date of the receiving order, and not the date at which public notice of it is given as the date at which the trustee's rights accrue, and I am not prepared to say that it is contrary to honourable and fair dealing and high-minded conduct to interfere with any transaction which has taken place during the stay of proceedings under the receiving order. I think, that from the point of view of that contention all dealings during the stay of proceedings must be protected,

and from that point of view *Ex parte Rabbidge* (1), to which we were referred, is of importance, although I do not think that case goes so far as was contended for. There no doubt a person who was neither the trustee nor the debtor was seeking to come into the bankruptcy, and the decision to my mind is not in point with what we have to deal to-day. What there happened was that during the time there was a stay of the advertisement of the adjudication—the case being one under the Bankruptcy Act, 1869, where the adjudication was the point of time to be regarded, the receiving order not existing at that time—the purchaser had paid to the bankrupt before adjudication a deposit in respect of the purchase money of certain leasehold property; the Registrar had held that as he had had no notice of the adjudication he could not be compelled to pay it over again to the trustee. The Court of Appeal disagreed with that decision and held that the money must be paid over again against the conveyance of the property agreed to be purchased. But then after the judgments had been delivered in that case James L.J., who was the learned judge who originated the doctrine of fair and right dealing, said (2): “It is much to be regretted that the advertisements of adjudications are so often postponed. These delays are a source of great mischief. It may be very hard on a debtor, who has been adjudged a bankrupt, not to stay the advertisement of the adjudication, if he has a bona fide ground for appealing; but, on the other hand, great hardship may be done to other persons if the adjudication is not advertised.” The learned judge, as I have said, was the originator of the doctrine of fair dealing. This case was not argued upon that ground, but he must have had it in his mind, and if he had thought that a mere stay of advertisement of the adjudication gave protection to all the transactions of the debtor during the stay he never could have said that great hardship may be done to other persons if the adjudication is not advertised.

But what is stronger still to my mind is this, that after that decision, and after the great hardship which might have

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been inflicted by not advertising the adjudication had been pointed out, the Legislature passed the Bankruptcy Act, 1883, and after that the Bankruptcy Act, 1914, and in each of those Acts left the position exactly as it had been before, with this qualification, that a receiving order was introduced in those two Acts as the point at which the rights of the trustee were to accrue, and it passed those two Acts without doing anything whatever to afford a protection now said to be the right of the person dealing with the debtor during the stay of the advertisement. Therefore on general principles the Legislature must be taken to have passed those subsequent Acts with these previous decisions before it, and that strengthens my opinion that it never intended to give this protection in every case of a stay of advertisement. In this case there is a stay of proceedings altogether, but that makes very little difference. The stay of advertisement is the important point. There is just this difference, that if the proceedings under the receiving order were not stayed and the advertisement only were stayed, then there is the possibility that the Official Receiver acting as trustee of the estate might find out who the debtor's bankers were, and might possibly give them notice. It may be that this is a point which has been overlooked by the Legislature. It may be that the protection ought to be given to persons in the position of the bankers in this case. That is a matter for the Legislature to consider. We have no right to legislate and give protection that the Act does not give. It has been said that bankruptcy is the creation of statute, and that the decisions of the Courts have added fair-mindedness and high-mindedness to the actual words of the Acts of Parliament, but this to my mind is asking us to give a protection which can only be given by the Legislature, and it is for the Legislature to consider whether or not it will give it.

That point being disposed of it leaves merely the facts of this particular case. If it cannot be laid down that persons in the position of the bank are always to be protected during the time when proceedings are stayed under a receiving order, then is there anything special in the facts of this particular

case which makes it right to give these particular bankers this particular protection? As to that the learned county court judge, a very experienced county court judge, and the Divisional Court, have seen nothing in the special circumstances of this case to lead them to give that protection. I cannot see my way to differ from them. Really the only thing we have to consider is whether on the facts of this particular case are we prepared to say that the county court judge and the Divisional Court were wrong in saying that there was nothing contrary to fair dealing in the trustee claiming to enforce this right, and whether there is anything contrary to right and fair dealing in the Court enabling him to do so, because the Court has in fact granted a stay? In my opinion there is no reason to differ from the Court below on that point, and I think the appeal must be dismissed.

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SCRUTTON L.J. This is a case of some importance and of some little difficulty. It is important for this reason. It is a very common practice now for the Court at the request of a debtor who wishes to appeal against a receiving order to stay its advertisement, and if the argument for the appellants be accepted in this case it appears to me that that would involve in the future the protection of all transactions entered into after the receiving order, and with persons ignorant of the receiving order, so long as the advertisement is stayed. It is a case of some little difficulty, because owing to the decisions of this Court judges sworn to administer the law and endeavouring to apply the law find themselves brought into a region which is not law, but ethics; a matter on which individual minds may easily differ.

The facts in this case are very simple. One Wigzell had a receiving order made against him in the Edmonton County Court, and the county court judge at his request made an order not only staying its advertisement but also staying all proceedings. The result of that was that not only was Wigzell's receiving order not advertised, but that a step which would probably have been taken if there were only a stay

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1921 stay of advertisement the trustee or Official Receiver would
WIGZELL, have ascertained who were the bankers of Wigzell and would
In re. have informed them of the existence of the receiving order.
HART, All proceedings having been stayed that step was not taken.
Ex parte. In consequence Barclays Bank, with whom Wigzell had an
Scrutton L.J. overdrawn banking account, went on with that account for
a short period, during which some 165*l.* of the bankrupt's
money was paid into it, and some 199*l.* was paid out. When
Wigzell's appeal was dismissed, the trustee said to Barclays
Bank: "You have received 165*l.* after the receiving order
was made; pay it to me; it is the property of the bankrupt,
to which I am entitled." To which Barclays Bank answered: "
"But we have paid out 199*l.* on cheques of the bankrupt."
To which the trustee answered: "That transaction, after
the receiving order, was invalid; you have received that
property and you cannot set off payments which you
ought not to have made in view of the fact that the money
paid was not the bankrupt's money but my money."

Now the decisions of this Court have established that though
in law the money is the money of the trustee for the creditors,
yet he may be restrained from enforcing his claim to it or
retaining it if (and a series of phrases none of which are
very definite have been used) it were not honourable—if
it were not high minded—if it would be contrary to natural
justice—if it would be shabby—if it would be a dirty trick
for him to retain it—or to take perhaps the most temperate
statement of the principle, which I find given by Buckley L.J.
in *In re Tyler* (1) and cited with approval by Atkin L.J. in
The llusson's Case (2): "Assuming that he (the officer of the
Court) has a right enforceable in a Court of justice, the Court
of Bankruptcy or the Court for the administration of estates
in Chancery will not take advantage of that right if to do so
would be inconsistent with natural justice and that which
an honest man would do." I desire to say very respectfully
that it seems to me that when we have got into this atmosphere
we have reached a region of uncertainty. Atkin L.J. says

(1) [1907] 1 K. B. 865, 873.

(2) [1919] 2 K. B. 735, 762.

in *Thellusson's Case* (1) that it may be difficult to find out honesty but it can be done. Of course there is the old saying that it may be difficult to define an elephant but you will know one when you see one; and perhaps a number of people seeing an elephant may all agree that it is an elephant, but a number of people looking for honesty easily find quite different things, and yet all may be perfectly honest and high-minded in differing in their views of morality upon a particular transaction. I entirely agree with Salter J. in this case that it is very difficult to call upon judges, who may be assumed to know the law, to lay down standards of high-mindedness or honour as to which perfectly honest and honourable persons may take entirely different views. However, there are the decisions, and this Court, accepting the principle as laid down (although certainly, as far as I am concerned, not all the dicta that have been used in some of the cases), will endeavour to apply the principle.

Now the principle was first laid down in two cases of payments made in mistake of law: *Ex parte James* (2) and *Ex parte Simmonds*. (3) There of course the foundation of the principle was laid by saying that a trustee was assumed to know the law, and that he was therefore assumed to receive money that he knew he ought not to receive and retain, and that the Court would not allow its officer to keep money which he must be taken to have known he ought not to have received. The principle was enlarged in *In re Tyler* (4) and in *In re Hall*. (5) In the first case there was a claim to the benefit of the money under a policy of insurance as to which the trustee was taken to have known that some third person would pay the premium. It was argued that the principle which had been laid down applied only to payment in mistake of law. The Court extended the principle and said, using very general language, that it also covered the case of taking advantage of payments made by a third person and not giving credit for them. In

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(1) [1919] 2 K. B. 735, 764.

(3) 16 Q. B. D. 308.

(2) L. R. 9 Ch. 609.

(4) [1907] 1 K. B. 865.

(5) [1907] 1 K. B. 875.

C. A. 1921 *In re Hall* (1) the Court were confronted with this position. that a secured creditor thinking to help his security had paid a composition to certain creditors of the bankrupt whose claims on the bankrupt's estate were thereby reduced and when the secured creditor realized his security he desired to add to it the sums by which he had reduced the claims on the estate of the bankrupt. The trustee had nothing to do with the matter, which was entirely the action of the secured creditor. The Court there said that there was nothing contrary to high-mindedness in the trustee saying : " Give me the balance of the proceeds of your security after you have satisfied your claim. It is quite indifferent to me that you have in fact reduced the claims on the bankrupt's estate by paying sums to the creditors who have therefore smaller claims on the estate," and the Court saw no difficulty whatever in the trustee making that claim. Then lastly came *In re Thellusson* (2), in which after the receiving order had been made a person lent to the debtor a sum of money to pay off a pressing creditor. It was found that neither the debtor nor lender actually knew that the receiving order had been made, although the debtor did know that a bankruptcy petition had been presented against him and that the hearing had been fixed for the previous day, but he had not taken sufficient interest in the matter to attend the hearing of the petition. In that case the Court said that inasmuch as if the debtor had known of the receiving order it would have been dishonourable of him to receive the money, the trustee ought to be directed to refund it. I think that case went a good deal further than any case had gone before, and that some of the dicta in the judgments go very much further. I reserve to myself full liberty to consider some of those dicta if that case should come before the Court of Appeal for consideration in a case which raises the same point. Now in all these cases there was an application by the Court of the principle to which I have referred, as stated by Buckley L.J., and in my view the application of the principle to the particular facts by any particular Court does not bind the Court as to

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its application in any subsequent case, but each Court taking the principle as laid down has to consider whether on the facts of the particular case before it, the action of the trustee does or does not infringe that principle. In my opinion when the Court is considering the application of the principle as a Court of Appeal in a matter of intricacy and difficulty like this, where the vague language used makes it very easy to take different views, it should not interfere with the action of a Court below which has tried to apply the principle, unless it is clearly satisfied that the view of the Court below is erroneous.

Now in this case we have a certain amount of guidance from the provisions of the Act. When the receiving order is made under s. 18, the property of the bankrupt is to become divisible amongst his creditors and is to vest in the trustee. What property of the bankrupt? We find that in s. 38: "All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy." What is the commencement of the bankruptcy? We turn to s. 37 and there find that the bankruptcy of a debtor is to be deemed to commence at the time of the act of bankruptcy being committed on which a receiving order is made against him. Obviously therefore it appears that, a receiving order being made on a particular date, and that date relating back to a much earlier date, there will be a series of transactions between the date of bankruptcy and the date of the receiving order in which persons will have dealt with the bankrupt without knowing that he is going to be made a bankrupt, and one would have expected the Act to have provided whether any protection should be given in such cases. We find accordingly in s. 45 that nothing in the Act is to invalidate certain payments by the bankrupt to his creditors or transactions of that kind, provided that both the following conditions are complied with, (1.) that the payment takes place before the date of the receiving order, and (2.) that the person to whom the payment is made has not at the time the payment is made notice of any available act of bankruptcy committed by the bankrupt before that time. The Legislature has

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C. A. therefore expressly laid down those two conditions as giving
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doubtful period of bankruptcy. It is quite clear that between
WIGZELL, the dates of the receiving order and the advertisement there
In re. will always be some interval of delay. The Act has not
HART, provided for that event at all, although it must always happen,
Ex parte. because the advertisement of the receiving order will always
Scrutton L.J. be two or three days later than the date of the receiving
order.

Further at the time when the Act of 1914 was passed the practice of the Court as to staying advertisements was perfectly well known and well recognized, and the Legislature, with that practice before it, either by omission or intentionally, has not thought fit in any way to alter the language by which the date of the receiving order was fixed as the crucial date. With that statutory provision made in reference to a perfectly well known practice, can one possibly say that a trustee is not high-minded or is not honourable in acting upon the statutory provisions that he finds clearly set out before him? Can one say that the Legislature itself is not honourable or high-minded because it did not insert a provision dealing with this set of facts which must occasion hardship to some persons? As has been pointed out by the Master of the Rolls, James L.J., the founder of the principle, expressly pointed out in *Ex parte Rabbidge* (1) that a stay of advertisement may cause considerable hardship to third parties ignorant of the existence of a receiving order. The view that the Court below and the county court judge have taken in this case is that in endeavouring to apply the principles laid down by the Court, they find it impossible to say that a trustee who acts upon this express statutory provision is guilty of any conduct which is not honourable or high-minded, or which is shabby, or which comes within any of the adjectives which have been used in laying down the principle.

On the best consideration I can give to the matter, the appellants have not satisfied me that the judges below were

(1) 8 Ch. D. 367, 372.

wrong in coming to that conclusion. On the contrary I think they were right, and I am very much impressed by what seems to me to be the very admirable and excellently worded judgment of Salter J. in this case. As far as I can see I should be prepared to accept every word of it. It is enough to say that I am not satisfied that the decision of the Divisional Court is wrong. Whether the state of things existing in this case must always arise to some extent in other cases and requires a remedy, is a matter which must be considered in two quarters. First of all I think the Court must consider whether it is continuously going to be lenient to the desire of debtors not to come prominently into public view as bankrupts. When it is pointedly brought to the Court's attention that the effect of staying an advertisement of a receiving order, while it may benefit the debtor, may inflict injury on third persons, it is a matter for the Court to consider whether they can impose any limitations on the stay of advertisement, or any terms upon the debtor. Frequently it seems to me that to impose a term on the debtor that he shall not part in any way with his property during the stay of advertisement will be to defeat one of the objects he has in asking for the stay where he hopes by negotiation to realize some of his property and pay off all his debts. On the other hand it will be a matter for Parliament to consider whether they did intentionally use the language which they have used, or whether they omitted to consider the possibilities which might result from a stay of advertisement after a receiving order. That is a matter not for this Court but for Parliament in its wisdom.

For these reasons I am unable to agree with the argument of the appellants that the decisions below were wrong, and I think this appeal should be dismissed.

YOUNGER L.J. I am of the same opinion. It would not I think be possible in this case to accede to the argument of the appellants without in effect repealing, so far as this bankruptcy is concerned, one of the most important provisions of the Bankruptcy Act, 1914. Sect. 45 provides that

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consideration,” provided, amongst other things, that the contract, dealing, or transaction takes place before the date of the receiving order. If the contention of the appellants in this case is to prevail, the result must be that every contract, dealing or transaction by or with this bankrupt for valuable consideration is to be protected even although it takes place after the date of the receiving order; and that, because it is conceded by Mr. Hogg that there is in relation to the transactions between the bank and this bankrupt, taking place after the date of the receiving order, no circumstances which would not equally apply to any other transaction of the bankrupt with any person other than the bank between the date of the receiving order and the date of its advertisement. The effect, therefore, as I have said, of acceding to the argument on the part of the appellants would be that, so far as this bankruptcy is concerned, this Court would in substance be ignoring that necessary condition for protection which is imposed by s. 45 of the Act. In other words, this case appears to me so far to be exactly within the class of cases referred to by Davey L.J. in *In re Clark* (1) in which, as he said, it would be very reasonable in accordance with a well-recognized principle of equity that such a transaction as that which took place between the bank and the debtor in this instance should be protected by statute. But it has not so far been protected by statute, subject to the consideration with which I will deal in a moment. If it is to be so protected, that is for the Legislature and not for the Court.

I would, however, wish to say this, with regard to the order which has been made by the county court judge and affirmed by the Divisional Court. By virtue of that order the bank is directed to pay to the trustee all sums paid by the debtor into his banking account between the date of the receiving order made by the county court judge and the date of its advertisement. I agree it is not for us to insert

(1) [1894] 2 K. B. 393, 411.

in that order any provisions which might be appropriate for the protection of the bank, in relation to the actual application by the debtor during the same period of the moneys so paid in. I say that because no evidence was adduced in the county court, nor are there any materials before us which would enable us to amend the order in that direction. But I desire, so far as I myself am concerned, most plainly to say that while I recognize that we are not at the moment in a position to give any directions on that subject or to make any order with reference to it, the affirmation by this Court of the order of the county court judge and of the Divisional Court does not, in my view, in any way preclude the bank at any subsequent period in this bankruptcy from claiming the right, by a proper application to trace into the pockets of persons who, but for the payments to them would have been creditors in the bankruptcy, the sums so paid to them out of the banking account which the bankers have now to restore to the intent that the bank may stand in the shoes of those persons so paid and receive from the trustee in bankruptcy the dividend to which but for that payment they would have been entitled. It cannot be the right of a trustee in bankruptcy at once to take the money which he is now taking from the bank and at the same time deprive the bank of the benefit of any advantage that has already accrued to the estate by the application of that money by the debtor. But, as I have said, that is not the question which is before us on this application, nor are there any materials on which we can make a suitable order with reference to it. So far as I am concerned the bankers are in no way prevented or prejudiced by the present order from making or succeeding on any such application if at a later stage they think fit to make it.

But it is said that the bank, although unable to bring themselves within the protection of the terms of the Act of Parliament, are entitled by a proper application of the principle first enunciated in *Ex parte James* (1) to be relieved of the order which has been made against them. It is

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contrary, it is said, to natural justice, or to use a less high sounding phrase, it is unconscionable on the part of the trustee or on the part of the Court to allow the trustee to recover this money from the bank in view of the circumstances in which the bank have already paid it away. Now speaking for myself I am not one of those prepared to be unduly critical of the principle laid down in *Ex parte James* (1) when properly applied. It would, I think, be lamentable if the Court were not free to resort to that principle and apply it in proper cases, and it is to my mind owing to the necessity of leaving to the Court in such cases the power so to do for the first time exercised in *Ex parte James* (1), that it has not been thought fit in any subsequent Act of Parliament to withdraw it. But I agree fully in thinking that as a matter of prudence the Court is well advised to exercise this power only in clear cases, and, although I should be the last to seek to fetter its exercise by any words of limitation, I think, avoiding the language of metaphor, that it may not be unwise to say that whether or not it may be exercised in other cases the Court should certainly be slow to refrain from exercising it in a case, in which, in the words of Lindley L.J. in *In re Carter and Kenderdine's Contract* (2), good sense would be shocked if the Court were not empowered to do so.

Now the circumstances in which with I think one exception this, as I conceive, useful jurisdiction has hitherto been exercised have been that the trustee in bankruptcy either of his own motion or acting under the direction of the Court, and, in each instance, having in view the benefit of the general body of creditors has entered upon a transaction which it is considered it would in the event be unconscionable for him to insist should be carried out strictly in accordance with the legal rights which the trustee under it possesses. Except in one case it has always been a feature that the transaction in question has in its origin been one initiated or approved in the interest of the general body of creditors. Now that cannot, in my opinion, upon the evidence before us, be affirmed here with reference to the order of the county court judge staying

(1) L. R. 9 Ch. 609.

(2) [1897] 1 Ch. 776, 781.

proceedings under the receiving order, and staying the advertisement, the action of the Court on which the bank's claim to relief is founded. It appears to me, so far as one may judge from any indications of the circumstances in the papers before us, that that order was made at the instance of the debtor and as an indulgence to him, probably because the learned county court judge felt sufficient distrust of the correctness of the receiving order he had just made to justify a direction that it should not be published to the world until the Divisional Court had had an opportunity of considering whether it ought to have been made at all. It is just possible that when giving that direction the learned county court judge, unduly distrustful of himself, perhaps did not very fully consider the consequences the stay might have for persons dealing with the debtor between the date of his own receiving order and the future date at which peradventure the Divisional Court would affirm it. And I recognize that one result of the present decision will very probably be that, in future, directions staying proceedings under receiving orders and especially staying the advertisement of those orders will not be easy to obtain by debtors against whom they have been made whether in a Court of subordinate jurisdiction or in any Court. And for myself I regret that that may be a consequence of the order which this Court is now about to make. Because, while one need have no special tenderness towards persons properly adjudicated bankrupt or against whom receiving orders are properly made, still, on the principle that every man is deemed to be innocent until he is proved to be guilty, it would I think be unfortunate that any one to whom the stigma of bankruptcy ought not to attach should, by reason of the order which we feel compelled to make in this instance, be hereafter published as a person against whom a receiving order has been made when in the event a superior Court subsequently comes to the conclusion that such an order ought never to have been made. But it may be possible in the future so to safeguard these staying directions by exacting undertakings from the debtor which in relation to persons in the position of the bank here would

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make them relatively or altogether innocuous. If this be not possible then it will be a question for the Legislature to consider how in proper cases persons with reference to whose liability to a receiving order there is a reasonable doubt can be protected from publication of that order until its appropriateness and justification have been finally established. Be that however as it may, the order of the Court here was not made, as I think, in the interests of the general body of creditors. As I have said, there is, I think, only one instance in which this benevolent jurisdiction initiated by *Ex parte James* (1) has been exercised of which that could not be affirmed and I do not think this ought to be another. The case to which I refer is *In re Thellusson* (2), which of course as a decision is binding upon this Court, although, as Scrutton L.J. has pointed out, it may well be that some of the observations made by the learned Lords Justices in the course of their judgments and not necessary for its actual result may hereafter properly be subject to reconsideration even in this Court. But one cannot look at *In re Thellusson* (2) without seeing that although the original transaction there was one not entered into by the trustee at all but by the bankrupt there were circumstances in connection with the case which made it obligatory, if one may use the expression, upon the Court to apply this principle if it felt it was properly within its competence so to do. The circumstance of extreme aggravation in that case which would have been left entirely unremedied had the Court not seen fit to make the order it did make was this, that the money which had been paid after the receiving order to the bankrupt and which still remained intact and undisposed of by him, was money of a lender for which in that then existing bankruptcy he would not have been entitled even to prove, and the consequence to him would have been that that money paid by him to the bankrupt and still intact and undisposed of would have gone to discharge the debts of every creditor of the bankrupt, if one may use the expression, other than himself; he would have been relegated to the right of presenting a petition in a

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subsequent bankruptcy, the assets of which would be only the surplus that remained after the creditors of the earlier bankruptcy had been paid twenty shillings in the pound out of his money—a shadowy right if ever there was one. Accordingly one need not be surprised that in that case the Court of Appeal were minded, believing that they properly could do so, to extend the principle of the previous cases even to one where the transaction in respect of which the question arose, was a transaction not of the trustee either under or without the direction of the Court but was a transaction of the debtor. Now I think that the consideration given to *In re Thellusson* (1) in the arguments of both sides in this appeal has very clearly brought out the essential difference between applying this principle to a transaction initiated by the bankrupt himself, not presumably in every case a person of the highest commercial morality, and a transaction initiated either by the trustee or the Court. In my view in considering the extent of this particular jurisdiction it is quite vital to distinguish between a trustee not insisting or the Court not permitting him to insist on all the legal consequences of, on the one hand, a transaction initiated by himself or by the Court in the interests of the general body of creditors and on the other hand a transaction initiated by the bankrupt. In the first case the creditors are the constituents of the trustee throughout, and as they are entitled to benefit by the transaction, so it does not seem to be wrong to say that they shall take it as it honourably is no more and no less. But in the second case the bankrupt has no constituents—that is to say, the transaction is initiated by him presumably in his own interests alone—and it is not obvious that a creditor with whom that transaction has been carried out and is complete, even one who in relation to it may have been tricked by the bankrupt, has any equity at all as against the other creditors of the same bankrupt, who may all have been equally tricked, merely because in his case the proceeds of the transaction can be traced amongst the bankrupt's assets, and in the other cases

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C. A. they cannot. Accordingly it does appear to me that while
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WIGZELL, general extension of this principle to transactions initiated
In re. by the bankrupt as distinct from transactions initiated by
HART, the trustee is one which in future cases will have to be
Ex parte. very jealously guarded, and as I have said this is not,
Younger L.J. in my judgment, one of these cases to which it should be
applied.

While, however, I have said what appeared to me to be permissible with regard to *In re Thellusson* (1), in order that I may not thereby be supposed to manifest any dislike of this principle I should wish to comment upon another case in which it arose—namely, *In re Stokes* (2)—where the learned judge refused to apply it to the facts that he had before him. Speaking for myself I wish to say that if that was a case in which it was necessary for the executrix of the debtor to invoke this principle at all—and I very much doubt it—I should myself have thought that having regard to the circumstances it was one in which the Court should have had no hesitation at all in applying it. The facts stated quite shortly were these: The debtor having no means whatever except those which had passed to his trustee in bankruptcy was paid by the trustee a salary in respect of services rendered by him to the trustee in connection with the administration of the estate. He had no property other than that salary. Instead of applying the whole of the salary in his day to day maintenance, or if you like in junketing or extravagance, he set apart a portion of it and paid premiums upon a policy of insurance taken out by him on his own life, obviously in order that the policy moneys might, as they did, become available for his widow after his decease. Those payments were continued by the debtor for I think about two or three years while the bankruptcy still continued. In 1883 the bankruptcy came to an end and the trustee was discharged, and from that date until the date of his death in 1917 the debtor continued out of his own money to pay the premiums upon the same policy, and in 1917, between twenty and thirty years

(1) [1919] 2 K. B. 735.

(2) [1919] 2 K. B. 256.

later, he died, and the policy moneys became payable. They were left by his will to his widow, and she claimed them from the insurance office. It was held in that case—the learned judge refraining from applying this principle, if it was necessary to invoke it—that the whole of these policy moneys belonged to an improvised trustee in bankruptcy appointed for the purpose of claiming them. I should have thought myself, in the first instance, that any money applied by a bankrupt out of a salary paid to him by the trustee for services rendered and his only property, was as much his own and remained as much his own whatever he did with it as if he never had been bankrupt at all. But even if we were to carry the case not quite so far as that, I certainly hope the decision will not be allowed to discourage other judges who have similar facts brought before them from applying to these facts what in relation to them would be the most salutary principle of *Ex parte James*. (1) In my view if *In re Stokes* (2) ever comes before this Court for review of the principle on which it proceeded, it will require to be very carefully considered whether it can be justified.

I return to the point with which I commenced. This particular case involved, as it appears to me, a repealing, so far as this bankruptcy is concerned, of an essential condition of s. 45 of the Act, under circumstances which do not attract this particular equitable jurisdiction first laid down in *Ex parte James*. (1) I recognize that there has been disclosed in this case a lacuna in the Act which it may seem well to the Legislature to fill up by appropriate amendment. I would also point out that a similar lacuna in the Act was disclosed by the decision of this Court in *In re Gunsbourg* (3), the effect of which was to make it clear in the particular circumstances of that case that the statement of A. L. Smith L.J. in *In re Carter and Kenderdine's Contract* (4), that it is contrary to all the provisions of the bankruptcy law that bona fide purchasers for value should have their title impeached by what they have done in good faith is not

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(3) [1920] 2 K. B. 426.

(4) [1897] 1 Ch. 776, 783.

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universally true. It may be that those who have to consider these matters, if they think it right to propose the introduction into the statute of amendments in respect of the subject raised by this appeal, may at the same time take the opportunity of considering whether the Act may not also be made more strictly just to persons in the position of those whom the decision in *In re Gunsbourg* (1) has shown are at present left unprotected.

I am of opinion that the appeal should be dismissed.

LORD STERNDALÉ M.R. I agree with what the Lord Justice has said, that this decision does not preclude the bank, if they think fit, from making an application in proper form for a reduction of the amount claimed by reason of the bankrupt's estate having benefited. I do not say what the result of such an application may be.

Appeal dismissed.

Solicitors for bank : *Beckingsale & Co.*

Solicitors for trustee : *Woolfe & Woolfe.*

(1) [1920] 2 K. B. 426.

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